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*H. Bush Cooper*

T H E  
CONVEYANCING AND LAW OF  
PROPERTY ACT, 1881,

AND THE  
Solicitors Remuneration Act, 1881,

WITH  
EXPLANATORY & PRACTICAL NOTES,

AND  
PRECEDENTS IN CONVEYANCING.

BY

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*Author of "Weekly Notes Digest of Cases not reported in the Law Reports, 1866—1879."*

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## P R E F A C E .

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THE Conveyancing and Law of Property Act, 1881, which came into operation on the 1st of January, 1882, contains many important alterations in the law of real property, and will probably have the effect of curtailing to a considerable extent the length of deeds by rendering unnecessary the use of many "common form" conditions of sale, covenants for title, "general words," the "estate clause," and covenants for production of documents. The ordinary powers incident to the estate or interest of a mortgagee, viz., a power of sale, to insure, to appoint a receiver, and to cut and sell timber, will, unless a contrary intention is expressed, be implied in the mortgage deed. In wills and settlements powers of appointing new trustees and powers of sale by trustees are implied. Trustees have power to compound debts and to apply income at their discretion for the maintenance of infants. Powers of distress and entry are attached to rentcharges and other annual sums charged on land.

Nearly forty years ago an attempt was made in this

direction by Lord BROUGHAM but without success. In that Act reform was attempted by providing that certain short forms of covenants should be regarded as equivalent to certain lengthy forms there set out.

The clauses implied by this Act seem to have been most judiciously chosen, and those relating to contracts for sale are, as a rule, more advantageous to a vendor than to a purchaser. The general words, and "the estate" clause, which are to be implied seem to be those in most general use in modern conveyances, and in hardly any case will it be necessary to exclude the operation of the Act.

In ordinary conveyances for value it will be unnecessary to insert the usual covenants for right to convey, quiet enjoyment, freedom from incumbrances, and further assurance, and in the case of leaseholds as to the validity of a lease.

An acknowledgment and undertaking for safe custody is more effectual than the ordinary covenant for production of documents; for it will be seen that the obligation created by an acknowledgment actually runs with the possession of the documents.

The attempt (for it is much to be feared that it amounts to nothing more) to get rid of the practice of inserting recitals, by the provisions of the 53rd section,



does not seem to be of great promise. The practical effect apparently is to give unlimited constructive notice without putting the purchaser really on his guard.

In the original draft of the bill (sect. 6) introduced by the Lord Chancellor, into the House of Lords, an attempt was made to restrict the present doctrine as to constructive notice. That section failed to become law upon the passing of the Act.

It will be noticed that in contracts for sale various expenses of production of documents, &c., not in the vendor's possession, and of verifying a vendor's title, &c., are, in the absence of express stipulation, thrown upon a purchaser; and the alteration of the law in this respect will, in some cases, probably induce a purchaser to hesitate before signing an open agreement to purchase.

On a sale of leaseholds the usual covenant by an assignee for payment of rent and performance of covenants and indemnity is not included in the covenants implied by the Act, and it will probably be considered advisable that the covenant should, for the vendor's protection, be inserted in the conveyance.

A conveyance of freehold land may now be made by a person to himself jointly with another, or to his wife,

without the help of the Statute of Uses. Limitations in fee and in tail may be made by the use of those words without the words "heirs" and "heirs of the body."

Mortgagees may deem it advisable to restrict the mortgagor's power of making leases conferred by sect. 18, and give to themselves an absolute power of leasing on default.

It is important to note that the consolidation of mortgages is abolished, except where one of the mortgages has been made before the Act or a contrary intention is expressed in the deed; but it is anticipated, that mortgagees will think it safer to preserve their existing right to consolidate. Relief against forfeiture of leases has been wisely extended and is applicable to those made either before or after the Act, notwithstanding any stipulations to the contrary. The residue of long terms of years where there is no rent, or merely a peppercorn rent, may now, subject to certain restrictions, be enlarged by the termors into a fee simple.

Whether the Act will be generally adopted is a question which time only will show. The obvious objection to the adoption of the provisions and powers implied by the Act is that the instrument will not

show upon the face of it the nature of the provisions and powers contained therein : so that anyone construing such an instrument must either be thoroughly conversant with the contents of the Act or have a copy of it before him as a guide.

The Solicitors Remuneration Act, 1881, makes important alterations in the remuneration of solicitors and introduces the principle of remuneration in conveyancing and other non-contentious business by a scale of rates of commission or per-centage ; and professional charges will not hereafter depend upon the number of folios in each document, but rather upon the skill, labour, and responsibility involved in any particular business transaction on the part of the solicitor.

M. W.

10, NEW SQUARE, LINCOLN'S INN,  
*January, 1882.*

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# TABLE OF CONTENTS.

---

## CONVEYANCING & LAW OF PROPERTY ACT, 1881.

### I.—PRELIMINARY.

SECT.	PAGE.
1. Short title ; commencement ; extent ... ..	1
2. Interpretation of property, land, &c. ... ..	2

### II.—SALES AND OTHER TRANSACTIONS.

#### *Contracts for Sale.*

3. Application of stated conditions of sale to all purchases ... ..	5
4. Completion of contract after death ... ..	12

#### *Discharge of Incumbrances on Sale.*

5. Provision by Court for Incumbrances, and sale freed therefrom ... ..	13
---	----

#### *General Words.*

6. General words in conveyances of land, buildings, or manor ... ..	15
---	----

#### *Covenants for Title.*

7. Covenants for title to be implied. On conveyance for value, by beneficial owner. Right to convey. Quiet enjoyment. Freedom from incumbrance. Further assurance. On conveyance of leaseholds for value, by beneficial owner. Validity of Lease. On mortgage, by beneficial owner. Right to convey. Quiet enjoyment. Freedom from incumbrance. Further assurance. On mortgage of leaseholds, by beneficial owner. Validity of lease. Payment of rent	
---	--

SECT.	PAGE.
and performance of covenants. On settlement. For further assurance, limited. On conveyance by trustee or mortgagee. Against incumbrances ...	18
<i>Execution of Purchase Deed.</i>	
8. Rights of purchaser as to execution. ...	29
<i>Production and Safe Custody of Title Deeds.</i>	
9. Acknowledgment of right to production, and under- taking for safe custody of documents ...	29
III.—LEASES.	
10. Rent and benefit of lessees covenants to run with rever- sion ...	34
11. Obligation of lessors covenants to run with reversion ...	35
12. Apportionment of conditions on severance, &c. ...	36
13. On sub-demise, title to leasehold reversion not to be required ...	37
<i>Forfeiture.</i>	
14. Restrictions on and relief against forfeiture of leases ...	37
IV.—MORTGAGES.	
15. Obligation on mortgagee to transfer instead of re-con- veying ...	41
16. Power for mortgagor to inspect title deeds ...	42
17. Restriction on consolidation of mortgages ...	43
<i>Leases.</i>	
18. Leasing powers of mortgagor and of mortgagee in pos- session ...	45
<i>Sale; Insurance; Receiver; Timber.</i>	
19. Powers incident to estate or interest of mortgagee ...	49
20. Regulation of exercise of powers of sale ...	52
21. Conveyance, receipt, &c. on sale ...	53

SECT.	PAGE.
22. Mortgagee's receipts, discharges, &c. ... ..	56
23. Amount and application of insurance money ... ..	57
24. Appointment, powers, remuneration, and duties of receiver... ..	59

*Action respecting Mortgage.*

25. Sale of mortgaged property in action for foreclosure, &c.	62
---	----

V.—STATUTORY MORTGAGE.

26. Form of statutory mortgage in schedule ... ..	65
27. Forms of statutory transfer of mortgage in schedule ... ..	66
28. Implied covenants, joint and several ... ..	69
29. Form of re-conveyance of statutory mortgage in schedule ... ..	70

VI.—TRUST AND MORTGAGE ESTATES ON DEATH.

30. Devolution of trust and mortgage estates on death ...	70
---	----

VII.—TRUSTEES AND EXECUTORS.

31. Appointment of new trustees, vesting of trust property, &c. ... ..	72
32. Retirement of trustee ... ..	75
33. Powers of new trustee appointed by court ... ..	77
34. Vesting of trust property in new or continuing trustees	77
35. Power for trustees for sale to sell by auction, &c. ...	79
36. Trustees' receipts ... ..	81
37. Power for executors and trustees to compound, &c. ...	82
38. Powers to two or more executors or trustees ... ..	84

VIII.—MARRIED WOMEN.

39. Power for court to bind interest of married woman ...	85
40. Power of attorney of married woman ... ..	86

IX.—INFANTS.

41. Sales and leases on behalf of infant owner ... ..	87
42. Management of land and receipt and application of income during minority... ..	89

SECT.	PAGE.
43. Application by trustees of income of property of infant for maintenance, &c. ... ..	94

#### X.—RENTCHARGES AND OTHER ANNUAL SUMS.

44. Remedies for recovery of annual sums charged on land	97
45. Redemption of quitrents and other perpetual charges...	100

#### XI.—POWERS OF ATTORNEY.

46. Execution under power of attorney ... ..	102
47. Payment by attorney under power without notice of death, &c., good ... ..	102
48. Deposit of original instruments creating powers of attorney ... ..	103

#### XII.—CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

49. Use of word grant unnecessary ... ..	105
50. Conveyance by a person to himself, &c.... ..	105
51. Words of limitation in fee or in tail ... ..	106
52. Powers simply collateral ... ..	107
53. Construction of supplemental or annexed deed...	109
54. Receipt in deed sufficient... ..	109
55. Receipt in deed or endorsed, evidence for subsequent purchaser ... ..	111
56. Receipt in deed or endorsed, authority for payment to solicitor... ..	111
57. Sufficiency of forms in Fourth Schedule ... ..	113
58. Covenants to bind heirs, &c. ... ..	113
59. Covenants to extend to heirs, &c... ..	115
60. Effect of covenant with two or more jointly ... ..	116
61. Effect of advance on joint account, &c... ..	118
62. Grants of easements, &c., by way of use... ..	119
63. Provision for all the estate, &c. ... ..	120
64. Construction of implied covenants ... ..	121

#### XIII.—LONG TERMS.

65. Enlargement of residue of long term into fee simple ...	121
---	-----



SECT.	PAGE.
-------	-------

## XIV.—ADOPTION OF ACT.

66. Protection of solicitor and trustees adopting Act	... 126
---	---------

## XV.—MISCELLANEOUS.

67. Regulations respecting notice	... .. 128
68. Short title of 5 & 6 Will. 4, c. 62	... .. 129

## XVI.—COURT ; PROCEDURE ; ORDERS.

69. Regulations respecting payments into court and applications	... .. 130
70. Orders of court conclusive	... .. 132

## XVII.—REPEALS.

71. Repeal of enactments in Part III. of Second Schedule ; restriction on all repeals	... .. 133
---	------------

## XVIII.—IRELAND.

72. Modifications respecting Ireland...	... .. 134
73. Death of bare trustee intestate, &c.	... .. 135
The First Schedule (Acts Affected)	... .. 136
The Second Schedule (Repeals)	... .. 137
The Third Schedule (Statutory Mortgage)	... .. 138
The Fourth Schedule (Short Forms of Deeds)	... .. 141

## CONVEYANCING PRECEDENTS AND FORMS.

NO.	
1.	General conditions of sale ... .. 145
2.	Conveyance of freeholds to a purchaser in fee ... .. 151
3.	Conveyance of freeholds subject to a lease for 99 years ... 152
4.	Conveyance of a life estate in freeholds ... .. 153
5.	Conveyance of freeholds by two tenants in common ... 153
6.	Conveyance of freeholds by husband to wife ... .. 154
7.	Conveyance of freeholds by a mortgagee, mortgagor not joining ... .. 155
8.	Conveyance of freeholds by a mortgagee and mortgagor... 156

NO.	PAGE
9. Conveyance of the equity of redemption in freeholds to a mortgagee as purchaser ... ..	157
10. Conveyance of the equity of redemption in freeholds by deed annexed or indorsed ... ..	158
11. Conveyance of leaseholds to purchaser ... ..	159
12. Covenant to surrender copyholds ... ..	160
13. Enlargement of residue of long term into a fee simple ...	161
14. Mortgage of freeholds to one ... ..	161
15. Mortgage of copyholds ... ..	164
16. Mortgage of leaseholds ... ..	165
17. Further charge ... ..	166
18. Transfer of a mortgage of freeholds, mortgagor not being a party ... ..	167
19. Transfer of a mortgage of freeholds in which the mort- gagor joins ... ..	168
20. Re-conveyance of freeholds or leaseholds ... ..	170
21. Marriage settlement ... ..	171
22. Appointment of a new trustee in place of one who retires ... ..	172
23. Deed discharging one of three (or more) trustees, and vesting the trust property in the two (or more) continuing trustees ... ..	173
24. Acknowledgment of right to production of documents of title ... ..	174
25. Power of attorney of a married woman to execute a deed ... ..	175
26. Power of attorney for a solicitor to execute a deed of conveyance on a sale ... ..	176
27. Statutory declaration by attesting witness ... ..	176

---

# THE SOLICITORS REMUNERATION ACT, 1881.

## PRELIMINARY.

SECT.	PAGE
1. Short title ; extent ; interpretation	179

## GENERAL ORDERS.

2. Power to make general orders for remuneration in conveyancing, &c.	181
3. Communication to Incorporated Law Society	182
4. Principles of remuneration	183
5. Security for costs and interest on disbursements	184
6. Order to be laid before houses of parliament, disallowance on address	184
7. Effect of order as to taxation	185

## AGREEMENTS.

8. Power for solicitor and client to agree on form and amount of remuneration	185
9. Restriction on Solicitors Act, 1870	187

INDEX	189
-------	-----

---





## TABLE OF CASES.

---

### A.

	PAGE
Adams <i>v.</i> Angell, 5 Ch. D. 634 ; 25 W. R. 139 ; 46 L. J. Ch. 54 ; 36 L. T. Rep. 334 ... ..	69
Alexander, <i>Re</i> , 13 Ir. Ch. Re. 137 ... ..	84
Aleyn <i>v.</i> Belchier, 1 W. & T. Leading Cases, 415 ; 1 Eden, 132 ... ..	109
Allen <i>v.</i> Richardson, 13 Ch. D. 524 ; 49 L. J. Ch. 137 ; 28 W. R. 313 ... ..	148
Anson <i>v.</i> Potter, 13 Ch. D. 141 ; 28 W. R. 91 ; 41 L. T. 582	82
Archbold <i>v.</i> Scully, 9 H. L. C. 360 ... ..	123

### B.

Baker <i>v.</i> Gray, 1 Ch. D. 491 ; 24 W. R. 171 ; 45 L. J. Ch. 165 ; 33 L. T. Rep. 721 ... ..	45
Baker <i>v.</i> Sebright, 13 Ch. D. 179 ; 28 W. R. 177 ; 49 L. J. Ch. 65 ; 41 L. T. Rep. 614 ... ..	52
Banister, <i>Re</i> , 12 Ch. D. 131 ; 27 W. R. 826 ; 40 L. T. 319 ...	132
Barrow <i>v.</i> Manning, W. N. 1880, p. 108 ... ..	44
Beioley <i>v.</i> Carter, L. R. 4 Ch. 230 ; 37 L. J. 92 ; 19 L. T. 472 ; 17 W. R. 300... ..	133
Bellamy <i>v.</i> Cockle, 2 W. R. 326 ; 18 Jur. 465 ... ..	65
Berney <i>v.</i> Sewell, 1 J. & W. 647 ... ..	59
Bewley <i>v.</i> Atkinson, 13 Ch. D. 283 ; 49 L. J. Ch. 153 ; 41 L. T. 603 ; 28 W. R. 638 ... ..	185
Blue <i>v.</i> Marshall, 3 P. Wms. 381 ... ..	83
Bolton <i>v.</i> London School Board, 7 Ch. D. 766 ; 26 W. R. 549 ; 47 L. J. Ch. 461 ; 38 L. T. Rep. 277 ... 8, 69,	151
Breary, <i>Re</i> , W. N. 1873, p. 48 ... ..	74

	PAGE
Breed's Will, <i>In re</i> , 1 Ch. D. 226 ; 24 W. R. 200 ; 45 L. J.	
Ch. 191 ... ..	95
Brett v. Clowser, 5 C. P. D. 376 ... ..	16, 148
Bulkeley v. Earl of Eglinton, 1 Jur. N. S. 994 ... ..	74

## C.

Camberwell and South London Building Society v. Holloway, 13 Ch. D. 754 ; 49 L. J. Ch. 361 ; 28 W. R. 222 ; 41 L. T. 752 ... ..	11
Cator v. Reeves, 9 Ha. App. liii, n. ; 16 Jur. 1004 ... ..	64
Charing Cross Advance, &c., Bank, <i>Ex parte</i> , 16 Ch. D. 35 ; 50 L. J. Ch. 157 ; 29 W. R. 204... ..	110
Chesworth v. Hunt, 5 C. P. D. 266 ; 28 W. R. 815 ; 40 L. J. C. P. 507 ; 42 L. T. Rep. 774 ... ..	45
Clay v. Tetley, <i>In re</i> , 16 Ch. D. 3 ; 50 L. J. Ch. 264 ; 29 W. R. 5 ... ..	13
Clive v. Carew, 1 J. & H. 199 ... ..	85
Clover v. Adams, 6 Q. B. D. 622 ... ..	130
Colyer v. Colyer, 3 De G. J. & S. 676 ; 11 W. R. 1051 ; 9 L. T. Rep. 214 ... ..	42
Cotton, <i>In re</i> , 1 Ch. D. 232 ; 24 W. R. 243 ; 45 L. J. Ch. 201 ; 33 L. T. Rep. 720 ... ..	95
Cracknall v. Janson, 11 Ch. D. 1 ; 27 W. R. 851 ; 48 L. J. Ch. 168 ; 40 L. T. Rep. 640 ... ..	44
Crowe's Trusts, <i>Re</i> , 14 Ch. D. 304, 610 ; 28 W. R. 885 ; 42 L. T. 822 ... ..	78
Cummins v. Fletcher, 14 Ch. D. 699 ; 28 W. R. 272 ; 49 L. J. Ch. 117 ; 41 L. T. Rep. 546... ..	44

## D.

D'Angibau, <i>Re</i> , 15 Ch. D. 228 ; 28 W. R. 311, 930 ; 49 L. J. Ch. 182, 756 ; 41 L. T. Rep. 645 ; 43 L. T. Rep. 135 ... ..	108
Dennison v. Halladay, 5 W. R. Exch. 357 ; 4 Jur. N. S. 1002 ; 3 H. & N. 670 ... ..	16
Dicker v. Angerstein, 3 Ch. D. 600 ; 24 W. R. 844 ; 45 L. J. Ch. 754 ... ..	57
Drew v. Nunn, 4 Q. B. D. 661 ; 48 L. J. 591 ; 40 L. T. 671... ..	103

	PAGE
Dunpor's Case, 4 Co. Rep. 119 b ; 1 Sm. L. C. 47 ...	37
Dunstan v. Patterson, 2 Phil. 345 ...	42

## E.

Edwards v. Slater, Tudor's Real Property L. C. 3rd Edit. 368 ; Hardr. 410 ..	52
Elliott v. Merryman, 1 W. & T. L. C. 64 ; Barnard Ch. Rep. 78 ...	82
Essex v. Daniell, L. R. 10 C. P. 538 ; 32 L. T. Rep. 476 ...	29

## F.

Falkner v. Equitable Reversionary Interest, 7 W. R. 73 ...	147
Fernandes, <i>Re</i> , W. N. 1878, p. 57 ...	185
Fernie v. Maguire, 6 Ir. Eq. Rep. 137 ...	82
Foster, <i>Re</i> , 2 D. F. J. 105 ...	184
Foster v. Harvey, 4 De G. J. & S. 59 ...	64
Francis v. Minton, L. R. 2 C. P. 543 ; 36 L. J. 201 ...	121
Freeman v. Read, 4 B. & S. 174 ...	53

## G.

Galloway v. Corporation of London, L. R. 4 Eq. 90 ...	186
Gee v. Mahood, 5 App. Cas. 588 ; 26 W. R. 789 ; 27 W. R. 843 ; 48 L. J. Ch. 657 ; 40 L. T. Rep. 663 ...	97
General Finance &c., Co. v. Liberator Benefit &c. Society, 10 Ch. D. 15 ; 27 W. R. 210 ; 40 L. T. 600 ...	151
George, <i>In re</i> , 5 Ch. D. 837 ; 26 W. R. 65 ; 47 L. J. Ch. 118 ; 37 L. T. Rep. 204 ...	95
Graham v. Jackson, 6 Q. B. 811 ; 14 L. J. Q. B. 129 ...	176
Grant v. Grant, 6 N. R. 347 ...	74
Grant v. Holland, 3 C. P. D. 183 ...	181

## H.

Hadgett v. Commissioners of Inland Revenue, 3 Ex. D. 46 ; 37 L. T. 612 ; 26 W. R. 115 ...	78
Halliday v. Dennison, 4 Jur. N. S. 1002 ; 5 W. R. Ex. 357	16
Hare v. Overseers of Putney, 7 Q. B. D. 223 ; 50 L. J. M. C. 81 ; 29 W. R. 721 ...	148
Hiatt v. Hillman, 19 W. R. 694 ; 25 L. T. Rep. 55 ...	54

	PAGE
Hobson <i>v.</i> Bell, 2 Beav. 17 ... ..	57
Honywood <i>v.</i> Honywood, L. R. 18 Eq. 306 ; 22 W. R. 749 ; 43 L. J. Ch. 652 ; 30 L. T. Rep. 671 ... ..	52, 90
Hungerford <i>v.</i> Clay, 9 Mod. 1 ... ..	45
Hurst <i>v.</i> Hurst, 16 Beav. 372 ... ..	64
Hutton <i>v.</i> Sealey, 6 W. R. 350 ; 4 Jur. N. S. 450 ... ..	64

## J.

James <i>v.</i> Biou, 3 Swanst. 241 ... ..	42
Jevon <i>v.</i> Bush, 1 Vern. 343 ... ..	83
Jones <i>v.</i> Bailey, 17 Beav. 582 ... ..	64
Jones <i>v.</i> Clifford, 3 Ch. D. 779 ; 45 L. J. Ch. 809 ; 24 W. R. 979 ... ..	9
Jones <i>v.</i> Smith, 2 Ves. Jun. 376 ... ..	44

## K.

Keech <i>v.</i> Hall, 1 Dougl. 21 ; 1 Sm. L. C. 574 ... ..	45
Kennedy <i>v.</i> Green, 3 M. & K. 699 ... ..	111
Kenrick <i>v.</i> Wood, L. R. 9 Eq. 333 ; 39 L. J. Ch. 92 ... ..	87
Kerr <i>v.</i> Pawson, 25 Beav. 394 ; 6 W. R. 447 ; 27 L. J. Ch. 594 ; 31 L. T. 224 ; 4 Jur. N. S. 425 ... ..	7

## L.

Law <i>v.</i> Glen, L. R. 2 Ch. App. 634 ... ..	60
Lawrie <i>v.</i> Lees, 14 Ch. D. 249 ; 28 W. R. 779 ; 49 L. J. Ch. 636 ; 42 L. T. Rep. 485 ... ..	10, 102
Lewis, <i>Re</i> , 1 Q. B. D. 724 ; 35 L. T. 857 ; 45 L. J. 816 ; 24 W. R. 1017 ... ..	185, 186
Lloyd <i>v.</i> Whitley, 17 Jur. 754 ... ..	65
Lowndes <i>v.</i> Norton, 6 Ch. D. 139 ; 25 W. R. 826 ; 46 L. J. Ch. 613 ... ..	90
Lowther <i>v.</i> Bentinck, L. R. 19 Eq. 166 ; 23 W. R. 156 ; 44 L. J. Ch. 197 ; L. T. Rep. 719 ... ..	11, 86, 95

## M.

Macrae <i>v.</i> Ellerton, 4 Jur. N. S. 967 ... ..	64
Manchester and Milford Rail. Co., <i>In re</i> , 14 Ch. D. 653 ; 42 L. T. Rep. 714 ... ..	59

	PAGE
Master <i>v.</i> Hansard, 4 Ch. D. 718 ; 46 L. J. Ch. 505 ; 25 W. R.	
570 ; 36 L. T. 535 ... ..	114
Matthew <i>v.</i> Northern Assurance Co., 9 Ch. D. 80 ; 47 L. J.	
Ch. 562 ; 27 W. R. 57 ; 38 L. T. 468 ... ..	130
Mears <i>v.</i> Best, 10 Ha. App. 41 ... ..	64
Mennard <i>v.</i> Welford, 1 Sm. & G. 426 ... ..	73
Middleton <i>v.</i> Chichester, L. R. 6 Ch. 152 ; 19 W. R. 299 ; 40	
L. J. Ch. 237 ; 24 L. T. Rep. 173... ..	30
Mills <i>v.</i> Jennings, 13 Ch. D. 639 ; on App. W. N. 1881,	
p. 127 ; 28 W. R. 549 ; 49 L. J. Ch. 209 ; 42 L. T. Rep.	
169 ... ..	44
Moravian Society, <i>Re</i> , 26 Beav. 101 ... ..	73
Moule <i>v.</i> Garrett, L. R. 7 Ex. 101 ; 41 L. J. Ex. 62 ; 20 W. R.	
416 ; 26 L. T. 367 ... ..	28
Moyse <i>v.</i> Gyles, 2 Vern. 385 ... ..	106

## N.

National Mercantile Bank, <i>Ex parte</i> , 15 Ch. D. 42 ; 28 W. R.	
399 ; 42 L. T. 64 ... ..	158
Neame <i>v.</i> Moorsom, L. R. 3 Eq. 91 ... ..	121
Newman <i>v.</i> Selfe, 33 Beav. 522 ; 10 Jur. N. S. 251 ... ..	64
Nunn <i>v.</i> Hancock, L. R. 6 Ch. 850 ; 40 L. J. Ch. 700 ; 25	
L. T. 469 ... ..	132

## O.

O'Brien <i>v.</i> Lewis, 11 W. R. 318 ; 9 Jur. N.S. 528, 620 ...	184
Ogle, <i>Ex parte</i> , L. R. 8 Ch. 715 ; 42 L. J. Bkey. 99 ; 21	
W. R. 938 ... ..	84

## P.

Palmer <i>v.</i> Locke, 15 Ch. D. 294 ; 28 W. R. 926 ... ..	108
Patman <i>v.</i> Harland, 17 Ch. D. 353 ; 29 W. R. 707 ; 50 L. J.	
Ch. 642 ; 44 L. T. Rep. 728 ... ..	7
Pease <i>v.</i> Fletcher, 1 Ch. D. 273 ; 24 W. R. 158 ; 45 L. J. Ch.	
265 ; 33 L. T. Rep. 644 ... ..	60
Pember <i>v.</i> Mathews, 1 Bro. C. C. 52 ... ..	28
Phillips <i>v.</i> Gutteridge, 4 De G. & Jo. 531 ; 3 De G. J. & S. 332	
	64, 97

	PAGE
Pike <i>v.</i> Fitzgibbon, 17 Ch. D. 454 ; 29 W. R. 551 ; 50 L. J.	
Ch. 394 ; 44 L. T. Rep. 562    ...    ...    ...    ...	86

## R.

Raggett, <i>In re</i> , 16 Ch. D. 117 ; 29 W. R. 314 ; 50 L. J. Ch.	
187 ; 44 L. T. Rep. 4    ...    ...    ...    ...    ...	44
Ratcliffe <i>v.</i> Winch, 17 Beav. 216    ...    ...    ...    ...	83
Rayner <i>v.</i> Preston, 14 Ch. D. 297 ; 28 W. R. 808 ; 18	
Ch. D. 1    ...    ...    ...    ...    ...    ...	148
Roach <i>v.</i> Wadham, 6 East. 289...    ...    ...    ...    ...	28
Robinson <i>v.</i> Wheelwright, 21 Beav. 214 ; 6 D. M. & G. 535.	85

## S.

Selby <i>v.</i> Pomfret, 1 J. & H. 336 ; 3 De G. F. & J. 595    ...	44
Shepherd's Settled Estates, <i>Re</i> , L. R. 8 Eq. 571    ...    ...	133
Siffken <i>v.</i> Davis, Kay, App. XXI.    ...    ...    ...    ...	64
Simmins <i>v.</i> Shirley, 6 Ch. D. 173 ; 26 W. R. 25 ; 46 L. J.	
Ch. 875 ; 37 L. T. Rep. 121    ...    ...    ...    ...	52
Smith <i>v.</i> Robinson, 13 Ch. D. 148 ; 28 W. R. 37 ; 49 L. J.	
Ch. 20 ; 41 L. T. Rep. 405    ...    ...    ...    ...	8
Sparke <i>v.</i> Montrieu, 1 Y. & C. 103    ...    ...    ...    ...	43
Spencer's Case, 1 Sm. L. C. 68 ; 5 Co. Rep. 16 a.    ...    ...	34
Sutton's Trusts, <i>Re</i> , 12 Ch. D. 175 ; 48 L. J. Ch. 350 ; 27	
W. R. 429    ...    ...    ...    ...    ...    ...	130
Swinbanks, <i>Ex parte</i> , 11 Ch. D. 525 ; 27 W. R. 898 ; 48 L. J.	
Bkey. 120 ; 40 L. T. Rep. 825    ...    ...    ...    110, 112	

## T.

Taite <i>v.</i> Gosling, 11 Ch. D. 273 ; 48 L. J. Ch. 397 ; 40 L. T.	
251 ; 27 W. R. 394...    ...    ...    ...    ...    114, 116	
Talbot <i>v.</i> Marshfield, L. R. 3 Ch. 622 ; 19 L. T. Rep. 223 ;	
37 L. J. 52    ...    ...    ...    ...    ...    ...	86
Tassell <i>v.</i> Smith, 2 De G. & J. 713    ...    ...    ...    ...	45
Tunstall, <i>Re</i> , 4 De G. & Sm. 421    ...    ...    ...    ...	74
Turner <i>v.</i> Skelton, <i>In re</i> , 13 Ch. D. 130 ; 28 W. R. 312 ; 49	
L. J. 115 ; 41 L. T. 668    ...    ...    ...    ...    ...	148

	PAGE
Twynam <i>v.</i> Pickard, 2 B. & Ald. 105 ... ..	35
Tyrrel's Case, Tudor's Real Property, L. C. 3rd Edit. 335 ;	
Dyer, 155 a.... ..	110, 155

## V.

Viney <i>v.</i> Chaplin, 4 Drew. 237 ; 2 De G. & J. 468 ; 27 L. J.	
Ch. 434 ; 4 Jur. N.S. 619 ... ..	29, 112

## W.

Wadman <i>v.</i> Calcraft, 10 Ves. 67 ... ..	38
Waddell <i>v.</i> Wolfe, L. R. 9 Q. B. 515 ; 43 L. J. Q. B. 138 ...	9
Wale <i>v.</i> Commissioners of Inland Revenue, 4 Ex. D. 270 ;	
27 W. R. 916 ; 48 L. J. Ex. 574 ; 41 L. T. Rep. 165 ...	69
Ward <i>v.</i> Dickson, 7 W. R. 148 ... ..	147
Ward <i>v.</i> Eyre, 15 Ch. D. 130 ; 49 L. J. 657 ; 28 W. R. 712	181
Watts <i>v.</i> Symes, 1 De. G. M. & G. 240 ... ..	44
Whitfield <i>v.</i> Roberts, 5 Jur. (N. S.) 113 ... ..	64
Wickham <i>v.</i> Nicholson, 19 Beav. 38 ... ..	64
Wigham <i>v.</i> Measor, 5 W. R. 394 ... ..	64
Wiles <i>v.</i> Gresham, 5 De G. M. & G. 770 ... ..	84
Williams <i>v.</i> Hathaway, 6 Ch. D. 544 ... ..	28
Wilton <i>v.</i> Hill, 25 L. J. Ch. 156 ... ..	85
Withington <i>v.</i> Withington, 16 Sim. 104 ... ..	73
Woodford <i>v.</i> Brooking, L. R. 17 Eq. 425 ; 22 W. R. 683 ...	64
Wormald <i>v.</i> Muzeen, 17 Ch. D. 167 ; 29 W. R. 753 ; 50 L. J.	
Ch. 482 ; 45 L. T. Rep. 409 ; on App. 29 W. R. 795 ...	97
Wright <i>v.</i> Burroughes, 3 C. B. 685 ... ..	35

## Y.

Yates <i>v.</i> Plumb, 2 Sm. & Giff. 174 ... ..	43
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# THE CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

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44 & 45 VICT. CHAP. 41.

AN Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other Instruments; and for amending in various particulars the Law of Property; and for other purposes. Sect. 1.

[22nd August, 1881.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows :

## I.—PRELIMINARY.

1.—(1.) This Act may be cited as the Conveyancing and Law of Property Act, 1881. Short title; commencement; extent.

(2.) This Act shall commence and take effect from and immediately after the thirty-first day of

Sect. 1. December, one thousand eight hundred and eighty-one.

(3.) This Act does not extend to Scotland.

Com-  
mence-  
ment of  
Act.

This Act comes into operation on the 1st of January, 1882. The Act does not extend to Scotland, but with slight modifications is applicable to Ireland (see *post*, sect. 72). Rules for purposes of this Act may under sects. 69 and 72 be made at any time after the passing of the Act (22nd August, 1881), to take effect on or after its commencement. It is important to notice that sects. 14, 15, 25, 31-33, 36, 37, 46, 47, 49, 53, 61, and 70 are retrospective.

*Retrospective  
actions*

Interpre-  
tation of  
of pro-  
perty,  
land, &c.

## 2. In this Act—

- (i.) Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest :
- (ii.) Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land :
- (iii.) In relation to land, income includes rents and profits, and possession includes receipt of income :
- (iv.) Manor includes lordship, and reputed manor or lordship :
- (v.) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assur-

ance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance: Sect. 2.

(vi.) Mortgage includes any charge on any property for securing money, or money's worth; and mortgage money means money, or money's worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee; and mortgagee in possession is, for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property:

(vii.) Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incum-

Sect. 2.

brance, or to require payment or discharge thereof :

- (viii.) Purchaser, unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property ; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser ; but sale means only a sale properly so called :
- (ix.) Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise ; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift :
- (x.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings ; and a building lease is a lease for building purposes or purposes connected therewith :
- (xi.) A mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes :
- (xii.) Will includes codicil :

- (xiii.) Instrument includes deed, will, inclosure Sect. 2.  
award, and Act of Parliament :
- (xiv.) Securities include stocks, funds, and shares :
- (xv.) Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any Act for the time being in force, effects or results similar to those of bankruptcy ; and bankrupt has a meaning corresponding with that of bankruptcy :
- (xvi.) Writing includes print ; and words referring to any instrument, copy, extract, abstract, or other document include any such instrument, copy, extract, abstract, or other document being in writing or in print, or partly in writing and partly in print :
- (xvii.) Person includes a corporation :
- (xviii.) Her Majesty's High Court of Justice is referred to as the Court.

## CONTRACTS FOR SALE.

### II.—SALES AND OTHER TRANSACTIONS.

**3.**—(1.) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.

Applica-  
tion of  
stated  
conditions  
of sale to  
all pur-  
chases.

The Act contains many important alterations, which are, as a rule, more advantageous to the vendor than the purchaser.

**Note to S. 3, ss. 1.** Previously to the Vendor and Purchaser Act, 1874, a sixty years' title was, subject to any stipulation to the contrary in the contract, required to be shown as the commencement of title. By that Act forty years was substituted as the root of title, and other important conditions were introduced. This section is supplemental to the provisions contained in sect. 2 of the Vendor and Purchaser Act, 1874 by which it was enacted that:—

**37 & 38 Vict. c. 78, s. 2.** “2. In the completion of any such contract of sale as aforesaid (*id. est.*, made after 31st December, 1874), and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say,

“First. Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold.

“Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions.

“Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

“Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and correction on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

“Fifth. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.”

Statutory conditions.

It is declared by the present Act that certain statutory

conditions there set out, and which are those usually inserted in an ordinary contract, shall be applicable to all purchases unless a contrary intention is expressed, and shall have effect subject to the terms and provisions of the contract. Note to  
S. 3, ss. 1.

Sub-sect. 1 extends the provisions of sect. 2 of the Vendor and Purchaser Act, 1874, and provides that the purchaser of a derivative lease shall not have the right to call for the title to the leasehold reversion (and see *post*, sect. 13, sub-sect. 1). This sub-section, seemingly, makes no alteration in the rule that a lessee has constructive notice of his lessor's title. *Patman v. Harland*, 17 Ch. D. 353.

(2.) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement.

This is the condition usually inserted in contracts for the sale of enfranchised lands. Dart's V. & P. 5th Edit. 289. Where, however, the enfranchisement has taken place under the Copyhold Enfranchisement Act, 1852, a good title to the lands enfranchised may be made without any proof of the lord's title. *Kerr v. Pawson*, 25 Beav. 394; 6 W. R. 447. Title to  
enfranchised  
lands.

(3.) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any infor-

Sect. 3. mation, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, enrolment, or otherwise.

Commence-  
ment of  
the title.

The expression "the time prescribed by law" appears to refer to sect. 1 of the Vendor and Purchaser Act, 1874, substituting forty years for sixty years as the root of title. But it is to be observed that in *Bolton v. London School Board*, 7 Ch. D. 766, it was held that a recital in a conveyance more than twenty years old, that the vendor was seized in fee simple, was sufficient evidence of that fact, and that no prior abstract of title could be demanded except so far as the recital should be proved to be inaccurate and that in such cases a forty years title was not required.

Powers.

This sub-section provides a most stringent condition which precludes the purchaser from requiring the production of a document creating a power upon the exercise of which the title depends, or from making any inquiry with respect to the title prior to the time prescribed by law or stipulated for its commencement. But it is anticipated that a purchaser may insist upon the objection where the vendor himself discloses a prior defective title. In *Smith v. Robinson*, 13 Ch. D. 148, where there was a condition that no earlier or other title should be required or inquired into, it was held that this condition did not preclude the purchaser



from insisting on an objection to the prior title which was not discovered through any inquiry made by him, but was accidentally disclosed by the vendor, and see also *Waddell v. Wolfe*, L. R. 9 Q. B. 515 ; and *Jones v. Clifford*, 3 Ch. D. 779. Note to S. 3, ss. :

(4.) Where land sold is held by lease (not including under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted ; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.

(5.) Where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted ; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

The production of the last receipt for rent is usually considered sufficient evidence of the performance of and compliance with the covenants and conditions in the lease up Receipt for rent.

**Note to S. 3, ss. 5.** to the completion of the purchase. Dart's V. & P. 5th Edit. 169. In *Lawrie v. Lees*, 14 Ch. D. 249, where, there being a continuing breach of covenant, there was a condition that the production of the last receipt for rent should be taken as conclusive evidence of the due performance of the lessee's covenants or of waiver of any breaches of them up to the time of the completion of purchase, it was held that the condition was binding and that the purchaser was bound to accept the title notwithstanding the breaches of covenant.

(6.) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser.

Expenses of produc- This condition is usually inserted in ordinary conditions of sale. But it is to be observed that this sub-section, in

the absence of express stipulation to the contrary, throws upon the purchaser various expenses of production of documents, &c., which were formerly borne by the vendor. As to the expression "not in the vendor's possession," compare it with the expression "possession or control" in sect. 9, sub-sect. 2, and the expression "in the custody or power of the mortgagee" in sect. 16, sub-sect. 1. The expression "or for any other purpose" appears to be a very comprehensive term, and it is doubtful whether the intention is to restrict the words to something *ejusdem generis*. See the interpretation placed upon the words "or otherwise for his benefit" by the Master of the Rolls, in *Lowther v. Bentinck*, L. R. 19 Eq. 166.

Note to  
S. 3, ss. 6.  
tion of  
docu-  
ments.

Any expenses incurred in tracing or in getting in the legal estate or questions respecting want or deficiency of stamps or want of registration are not referred to in this sub-section (and see sect. 2 of the Vendor and Purchaser Act, 1874). In *Camberwell and South London Building Society v. Holloway*, 13 Ch. D. 763, it was held that the general rule was that a man makes a good title by showing a good equitable title and power to get in the legal estate, and that he is not bound to trace the legal estate further than to show that you can get at it.

(7.) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense.

It will now be unnecessary for the vendor to insert this usual condition.

Sale in  
lots.

(8.) This section applies only to titles and purchasers on sales properly so called, notwithstanding any interpretation in this Act.

Sect. 3 applies only to titles and purchasers on sales properly so called. This limits the definition of the word Sales properly so called.

**Note to S. 3, ss. 8.** "purchaser" in sect. 2 (viii.), and consequently these conditions are not applicable to a contract for a mortgage or a lease.

(9.) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(10.) This section applies only to sales made after the commencement of this Act.

(11.) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court.

Comple-  
tion of  
contract  
after  
death.

**4.—(1.)** Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

Personal  
represent-  
atives  
have power  
to convey

By this section the personal representatives of a vendor dying before the completion of a contract for sale are empowered to convey a freehold interest to a purchaser. The difficulty and expense hitherto incurred of getting in

the legal estate from an infant heir or devisee of such vendor may now be avoided. Note to S.4, ss.1.

The words "for the sale of the fee simple or other freehold interest" appear to have the effect of making this section inapplicable to copyholds descendible to heirs general. Copyholds.

The words "personal representatives" seemingly include an administrator as well as an executor; see sect. 16 of 22 & 23 Vict. c. 35, and *In re Clay v. Tetley*, 16 Ch. D. 3, where it was decided that an administrator had no power to sell the estate by virtue of that section. Per HALL, V.C.:—"I cannot substitute the word 'representative' for 'executors.'" Compare this section with sect. 30 of the principal Act, where all trust and mortgage estates of inheritance vested solely in a person dying after the 31st December, 1881, shall, notwithstanding any testamentary disposition, vest in his personal representatives as chattels real, and may be dealt with by them as such. Personal representatives.

(2.) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

It will be observed that by sub-sect. 2 a conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate. As to questions relating to such rights, see Dart's V. & P., 5th Edit. 262.

(3.) This section applies only in cases of death after the commencement of this Act.

### *Discharge of Incumbrances on Sale.*

5.—(1.) Where land subject to any incumbrance, whether immediately payable or not, is Provision by court for incum-

**Sect. 5.** sold by the Court, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into court such additional amount as the court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount.

Discharge  
of incum-  
brances on  
sale.

The Court has power under this section, on the application of any party to a sale, to direct payment into Court of the amount of any incumbrance or charge on the land sold. As to the definition of the word "incumbrance," see *ante*, sect. 2 (vii).

The meaning of "the Court" is explained as to land in England by sect. 2 (xviii), and sect. 69, sub-sect. 1; as to land in the County Palatine of Lancaster by sect. 69, sub-sect. 9; and as to land in Ireland by sect. 72, sub-sect. 2.

The term "government securities" is defined in sect. 3 of the Court of Chancery (Funds) Act, 1872, as meaning any annuities, exchequer bonds, exchequer bills, and other parliamentary securities of the government of the United Kingdom.

(2.) Thereupon, the Court may, if it thinks fit, Sect. 5. and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

Sub-sect. 2 confers on the Court a discretionary power, without giving any previous notice to the incumbrancer, to free the land for the purposes of sale and to make any order for conveyance, or vesting order, although, it is anticipated, the Court will in practice always require notice to be given to the incumbrancer to attend when the amount to be paid into Court is determined. Notice to incumbrancers.

An application to the court must be by summons at chambers; see sect. 69, sub-sect. 3.

(3.) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4.) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made.

### *General Words.*

**6.—(1.)** A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, General words in conveyances of



Sect. 6. fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

General words.

Every conveyance made after the commencement of this Act will, unless a contrary intention is expressed, include the rights and easements enumerated in this section. The general words implied in this section for the different descriptions of property comprise those usually inserted in ordinary conveyances, with the important omission in sub-sects. 1 and 2 of the words "quarries, mines, and minerals." It will probably be deemed advisable to add these words if they are intended to be included in the conveyance (*Dennison v. Halladay*, 5 W. R. Exch. 357), or to expressly reserve them if such is the intention. And it is thought that this omission may to some extent prevent the complete adoption of the forms of general words contained in sub-sects. 1 and 2.

Mines and minerals.

Easements and privileges.

As to the importance of inserting the words "now used, occupied, and enjoyed," see *Brett v. Clouser*, 5 C. P. D. 376. Additional words were not required to be inserted in a conveyance to pass easements and privileges legally appurtenant to property. But easements and privileges used or enjoyed with or reputed to appertain to property without being legally appurtenant will not pass by an ordinary conveyance without being expressly included. (Dav. Conv. I. 4th Edit. 92.)

Intention to exclude.

It is to be observed that if it is intended to adopt another form of general words the operation of this section must be expressly excluded from the conveyance, otherwise the statutory words will be implied and read in conjunction with the form of general words inserted in the conveyance.



(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall, by virtue of this Act, operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof. Sect. 6.

(3.) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rentscharge, rents seek, rents of assize, fee farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of convey-

Sect. 6. ance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

(4.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

(6.) This section applies only to conveyances made after the commencement of this Act.

### *Covenants for Title.*

Covenants  
for title to  
be implied.

**7.—**(1.) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each

of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say : Sect. 7.

This section will considerably curtail the length of deeds, and in every conveyance the covenants for title set out in this section will, in the absence of stipulations to the contrary be implied and binding both on the vendor and purchaser. But it is to be noticed that these covenants are not implied on the part of the person conveying if such person is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic, or under an order of the Court, or by direction of a person as beneficial owner. (Sub-sect. 4). Implied covenants for title.

(A.) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely) : On conveyance for value, by beneficial owner.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken by the person to whom the conveyance is expressed to be made, and any Right to convey.

**Sect. 7.**  

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Quiet en-  
joyment.Freedom  
from  
incum-  
brance.Further  
assurance.

person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person, or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value; and further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate

or interest in the subject-matter of convey- Sect. 7.  
 ance, other than an estate or interest subject  
 whereto the conveyance is expressly made,  
 by, through, under, or in trust for the person  
 who so conveys, or by, through, or under  
 any person conveying by his direction, or by,  
 through, or under any one through whom  
 the person who so conveys derives title,  
 otherwise than by purchase for value, will,  
 from time to time, and at all times after the  
 date of the conveyance, on the request and  
 at the cost of any person to whom the con-  
 veyance is expressed to be made, or of any  
 person deriving title under him, execute and  
 do all such lawful assurances and things for  
 further or more perfectly assuring the subject-  
 matter of the conveyance to the person to  
 whom the conveyance is made, and to those  
 deriving title under him, subject as, if so  
 expressed, and in the manner in which the  
 conveyance is expressed to be made, as by  
 him or them or any of them shall be reason-  
 ably required :

(in which covenant a purchase for value shall not  
 be deemed to include a conveyance in considera-  
 tion of marriage) :

(B.) In a conveyance of leasehold property for On convey-  
 valuable consideration, other than a mortgage, ance of  
 the following further covenant by a person who leaseholds  
 conveys and is expressed to convey as beneficial for value,  
 owner (namely) : by benefi-  
 cial owner.

That, notwithstanding anything by the person Validity of  
 lease.

Sect. 7.

who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance :

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage) :

On mortgage by  
beneficial  
owner.

(C.) In a conveyance by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Right to  
convey.

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed ; and also that, if default is made in payment of the money intended to

Quiet en-  
joyment.

be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made; and further, that the person who so conveys, and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will, from time to time, and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him,

Sect. 7.

Freedom  
from in-  
cumbrance.Further  
assurance.



Sect. 7.

but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required :

On mortgage of leaseholds, by beneficial owner.

(D.) In a conveyance by way of mortgage of leasehold property, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely) :

Validity of lease.

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed, and is in full force, unforfeited, and unsurrendered and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance ; and also that the person so con-



veying, or the persons deriving title under Sect. 7. him, will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them :

Payment  
of rent and  
perform-  
ance of  
covenants.

(E.) In a conveyance by way of settlement, the following covenant by a person who conveys and is expressed to convey as settlor (namely) :

On settle-  
ment.

That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more

For fur-  
ther assu-  
rance,  
limited.

Sect. 7.

perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required :

On convey-  
ance by  
trustee or  
mortgagee.

(F.) In any conveyance, the following covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only (namely) :

Against  
incum-  
brances.

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

(2.) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to

convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject matter so conveyed by his direction; and a covenant on his part shall be implied accordingly. Sect. 7.

(3.) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

(4.) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance.

(5.) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land.

Sect. 7. (6.) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

Benefit of implied covenant. The benefit of an implied covenant runs with the land. *Roach v. Wadham*, 6 East 239.

The purchaser on a sale of leaseholds either by the original lessee or by an assignee, who has entered into a covenant with a prior owner, is under an obligation to enter into a covenant for payment of rent and performance of covenants and indemnity. *Moule v. Garrett*, L. R. 7 Exch. 101; *Pember v. Mathers*, 1 Bro. C. C. 52; Dart's V. & P. 4th Edit. 511.

This covenant is not included in the implied covenants set out in this section and therefore should be inserted in the conveyance for the vendor's protection.

(7.) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

Implied covenants may be varied or extended, but when they are once implied (sub-sect. 4) they will not be excluded by a proviso which is in terms wholly repugnant to that covenant. *Williams v. Hathaway*, 6 Ch. D. 544.

(8.) This section applies only to conveyances made after the commencement of this Act.

*Execution of Purchase Deed.*Sect. 8.

8.—(1.) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

Rights of  
purchaser  
as to exe-  
cution.

The general rule that a purchaser might in the absence of special circumstances insist upon the vendor's executing the conveyance in his presence or in that of his solicitor is broken through by this section. *Viney v. Chaplin*, 2 De G. & J. 468; *Essex v. Daniell*, L. R. 10 C. P. 538.

The object of this section is to protect a vendor, residing at some distance from the place of completion, from the expense and inconvenience which would be incurred by his attending the execution of the conveyance.

As to the execution of a deed under a power of attorney, see *post*, sect. 46; as to authority for payment of consideration money to vendor's solicitor, see *post*, sect. 56.

(2.) This section applies only to sales made after the commencement of this Act.

*Production and Safe Custody of Title Deeds.*

9.—(1.) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

Acknowledgment of right to production, and undertaking for safe custody of documents.

This appears to be one of the most comprehensive sections in the Act. The acknowledgment and under-

Note to S. 9 ss. 1. taking must be in writing (sect. 2 (xvi.)), but apparently it is not necessary that it should be by deed. A form of acknowledgment and undertaking is given in Form iii. of the Fourth Schedule to this Act. If the acknowledgment is not inserted in the deed but is by a separate document it will be advisable to stamp it as an agreement.

Stamp on acknowledgment.

Application to the court. An application to the Court under sub-sect. 7, for production of documents, is to be made by summons in chambers. (Sect. 69.)

(2.) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

Possession or control.

The words "in the possession or under the control" may be compared with the expression referring to documents "not in the vendor's possession" (sect. 3, sub-sect. 6); and with the expression "documents in the custody or power of the mortgagee" (sect. 16, sub-sect. 1). These words occur in the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4, and were discussed in *Middleton v. Manchester*, L. R. 6 Ch. 152.

(3.) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent,

having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates. Sect. 9.

(4.) The obligations imposed under this section by an acknowledgment are—

(i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorized in writing; and

(ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

(iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

(5.) All costs and expenses of or incidental to the specific performance of any obligation im-



Sect. 9. posed under this section by an acknowledgment shall be paid by the person requesting performance.

(6.) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

(7.) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the Court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the Court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(8.) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

(9.) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each



individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncanceled, and undefaced, unless prevented from so doing by fire or other inevitable accident. Sect. 9.

(10.) Any person claiming to be entitled to the benefit of such an undertaking may apply to the court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(11.) An undertaking for safe custody of documents shall, by virtue of this Act, satisfy any liability to give a covenant for safe custody of documents.

(12.) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this Act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

(13.) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

Sect. 9. (14.) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this Act.

### III.—LEASES.

Rent and benefit of lessees covenants to run with reversion.

**10.**—(1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessees part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

Benefit of lessee's covenants.

The rent reserved by a lease and the benefit of lessee's covenants and right of re-entry runs with the immediate reversion and may be recovered by the person entitled to the whole or part of the income of the land leased.

This section does not relieve the lessee from the liability of performing his covenants.

The word "assigns" is by sect. 58 of this Act imported into covenants relating to land. As to the assignee of a lease being bound to perform certain covenants, see *Spencer's Case*, 1 Smith L. C. 8 Edit. 68.

Assignment of reversion.

An assignee of the reversion of part of the demised premises could under the statute of 32 Hen. 8, c. 34, take advantage of the covenants respecting that part and so

Note to  
Sect. 10.

also might an assignee of part of the reversion. (See *Woodfull's* L. & T. 11th Edit. 234; *Twynan v. Pickard*, 2 B. & Ald. 105.) But it was held in *Wright v. Burroughs*, 3 C. B. 685, that an assignee of the reversion of part could not take advantage of a condition broken, though an assignee of part of the reversion in the whole property might. By sect. 3 of 22 & 23 Vict. c. 35, it is provided that where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.

(2.) This section applies only to leases made after the commencement of this Act.

**11.**—(1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be

Obligation of lessors covenants to run with reversion.

Sect. 11. taken advantage of and enforced against any person so entitled.

(2.) This section applies only to leases made after the commencement of this Act.

See note to preceding section.

Apportionment of conditions on severance, &c.

**12.**—(1.) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2.) This section applies only to leases made after the commencement of this Act.

Apportionment of conditions on severance, &c.

This section appears to be supplemental to the two preceding sections (see note to sect. 10), and provides that every condition or right of re-entry shall, notwithstanding the severance of the reversionary estate or cesser of the term as to part only of the land leased, be apportioned

and remain annexed to each part of the land as if such part had alone originally been comprised in the lease. Note to S.12. ss.2

The principle of law established by *Dumfries's Case*, 4 Co. Rep. 119 b., and by subsequent decisions, that every condition of re-entry was entire and indivisible; and that if a condition had been waived once it could not be enforced again, was altered as to crown lands by 8 & 9 Vict. c. 99, s. 5, and generally by the statute 22 & 23 Vict. c. 35; and is now apparently abolished by this section. See 23 & 24 Vict. c. 38, s. 6, and note to sect. 10 of this Act. Waiver of condition.

**13.**—(1.) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion. On sub-demise, title to leasehold reversion not to be required.

(2.) This section applies only if and as far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(3.) This section applies only to contracts made after the commencement of this Act.

This section supplements the provision contained in sect. 2, sub-sect. 1, of the Vendor and Purchaser Act, 1874, and guards an intending lessor against requisitions on the part of an intending lessee with reference to his right to call for the title to the leasehold reversion; with this section compare sect. 3, sub-sect. 1, of this Act with regard to a grant, as distinguished from an assignment, of an underlease. Title to leasehold reversion.

### *Forfeiture.*

**14.**—(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for Restrictions on and relief

5. leave under agreement for lease  
forfeiture

**Sect. 14.** a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

**Relief against forfeiture of leases.** The relief against forfeiture of leases granted by this section is one of the most important provisions in the Act, especially as the lessee cannot under sub-sect. 8, contract himself out of the right to obtain it.

It has long been decided that the courts of equity will relieve against a forfeiture for non-payment of rent (*Wadman v. Calcraft*, 10 Ves. 67) upon the tenant paying the arrears of rent and costs to the landlord or into Court if proceedings were taken within six months from the date of execution of the judgment in ejectment. See Common Law Procedure Acts, 1852 and 1860 (15 & 16 Vict. c. 76), ss. 210, 211 ; 23 & 24 Vict. c. 126, s. 1.

**Breach of covenant to insure.** The Court had, under 22 & 23 Vict. c. 35, ss. 4—9, power to grant relief against a forfeiture occasioned by the breach of covenant to insure against fire where no loss has happened and the breach has happened through accident, mistake, or otherwise, without fraud or negligence. These sections are now repealed by sub-sect. 7, and relief against forfeiture for breaches of covenants to insure may now be granted under this section.

**Service.** As to the regulations respecting service of notice on lessee by lessor, see sect. 67.

**Reasonable time.** The terms “a reasonable time” and “reasonable compensation” give a wide latitude to the powers of the



Court, and must depend to a great extent upon the particular breach of covenant, the amount of damage, and the circumstances of each individual case. Note to S.14.ss.1.

(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

The application to the Court must be made by summons in chambers (sect. 69). If the lessor is not proceeding by action or otherwise to enforce such right of re-entry or forfeiture, the lessee apparently must bring an action himself before he can apply to the Court for relief. Application to Court.

"The Court" is defined by sect. 2 (xviii.), as Her Majesty's High Court of Justice, and consequently the county courts have no power to entertain an application under this section.

(3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a

Sect. 14. grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

(4.) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6.) This section does not extend—

(i.) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or

(ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.

Covenants excepted      It is to be observed that this section does not apply (1.) to a covenant against assigning or underletting, or to a



condition for forfeiture on bankruptcy of lessee, or on the taking in execution of the lessee's interest; or (2.) in a mining lease to a covenant for allowing the lessor to inspect the books or to enter the mine. As to the definition of "bankruptcy" and "mining lease," see sect. 2 (xi. and xv.).

Note to S.14, ss.6.  
from section.

(7.) The enactments described in Part I. of the Second Schedule to this Act are hereby repealed.

(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

See note to sub-sect. 1.

(9.) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

It will be noticed that this section is retrospective and cannot be excluded by any stipulation to the contrary.

#### IV.—MORTGAGES.

**15.**—(1.) Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly.

Obligation on mortgagee to transfer instead of re-conveying.

Sect. 15. (2.) This section does not apply in the case of a mortgagee being or having been in possession.

(3.) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

Assign-  
ment of  
mortgage  
debt.

Before this Act it was held that a mortgagor had no right to require the mortgagee to assign the mortgage debt when he was paid off; all that could be demanded was the reconveyance of the mortgaged estate. *Dav. Conv. ii. Part 2, 280; Dunstan v. Patterson, 2 Phil. 345.*

This section rescinds the above rule, except in a case of a mortgagee being or having been in possession (see sub-sect. 2). It also apparently has the effect of overruling the decision in *Colyer v. Colyer, 3 De G. J. & S. 676*, and the decision in *James v. Biou, 3 Swanst. 241*, where it was held by Lord ELDON that "no mortgagee can be compelled to place another person in his stead as mortgagee."

Exclusion  
by con-  
tract.

It is to be observed that the operation of this section cannot be excluded by any contract or stipulation to the contrary (sub-sect. 3).

Power for  
mortgagor  
to inspect  
title deeds.

**16.**—(1.) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

(2.) This section applies only to mortgages made after the commencement of this Act, and

shall have effect notwithstanding any stipulation Sect. 16.  
to the contrary.

Hitherto the general rule was that a mortgagee could not be compelled to produce the title deeds until he was paid off: *Sparke v. Montriau*, 1 Y. & C. 103; but in *Yates v. Plumb*, 2 Sm. & Giff. 174, it was held that where a mortgagee was ordered to reconvey part of a mortgaged estate to the mortgagor he was compelled to produce the deeds relating to the whole estate which he retained. *Prid. Conv.* 8th Edit. vol. i. p. 198.

This section virtually overrules the decision of *Sparke v. Montriau*, *supra*, and provides that a mortgagor as long as his right to redeem subsists, notwithstanding any stipulation to the contrary, shall be entitled on payment of the mortgagee's costs to inspect and make copies of the documents of title in his custody.

With the expression "in the custody or power of the mortgagee" compare the expression "not in the vendor's possession" in sect. 3, sub-sect. 6, and the expression "possession or control" with reference to documents in sect. 9, sub-sects. 2 and 9.

The power of inspecting the title deeds in the custody of the mortgagee is by this section restricted to the mortgagor, and does not compel the mortgagee to produce them to third parties.

**17.—(1.)** A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

Sect. 17. (3.) This section applies only where the mortgages or one of them are or is made after the commencement of this Act.

Consolidation of mortgages. The restriction on consolidation of mortgages in this section does not apply if a contrary intention is expressed in the mortgage deeds or one of them (sub-sect. 2), and is applicable where one of the mortgages is made after the commencement of this Act.

The rule respecting consolidation of mortgages originally was that when several distinct estates were mortgaged separately as securities for distinct debts by one mortgagor to one mortgagee, the latter had a right to hold all the estates as security for the aggregate of all the debts. *Dav. Conv. ii. Part 2, 4th Edit. 289.* This doctrine formerly only applied to legal mortgages absolutely conveyed by way of mortgage (*Jones v. Smith*, 2 Ves. Jun. 376), but is now applicable to legal or equitable securities both in suits for foreclosure as well as redemption (*Watts v. Symes*, 1 De G. M. & G. 240; *Selby v. Pomfret*, 1 J. & H. 336; 3 De G. F. & J. 595; *Cracknall v. Janson*, 11 Ch. D. 1); and is also applicable, notwithstanding that the first security had proved worthless, and that the representatives of the mortgagor were not entitled to redeem the property comprised in the second mortgage except upon payment of both mortgage debts. *Barrow v. Manning*, W. N. 1880 p. 108. But in *In re Raggett*, 16 Ch. 117, it was held that the doctrine did not apply where one of the securities had ceased to exist. In *Cummins v. Fletcher*, 14 Ch. D. 699, it was held that consolidation only applies where default has been made on all the securities in respect of which it is claimed, and per JAMES, L. J., "there can be no consolidation between a mortgage by A. for his own debt and a mortgage by A. and B. of other property for their partnership debt."

Tendency of modern decisions. The tendency of the decisions of the courts of late has been to restrict the doctrine of consolidation, which had gradually been extended beyond its original limits. In *Mills v. Jennings*, 13 Ch. D. 639, on App. 28 W. R. 549, it

was held (reversing the case of *Tassell v. Smith*, 2 De G. & J. 713) that the doctrine did not apply to a case in which one of the mortgages was created subsequently to the assignment of the equity of redemption to the person seeking to redeem; and see *Baker v. Gray*, 1 Ch. D. 491. And in *Chesworth v. Hunt*, 5 C. P. D. 266, it was held that the doctrine of consolidation does not enable a bill of sale holder to tack a prior mortgage of other property of the grantor, and claim that the surplus proceeds of the goods, after discharging the sum secured by the bill of sale, shall be applied in satisfaction of the prior mortgage, so as to defeat the right of the execution creditor to such surplus; and see the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8.

**Note to  
Sect. 17.**

### *Leases.*

**18.—(1.)** A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

Leasing  
powers of  
mortgagor  
and of  
mortgagee  
in posses-  
sion.

Prior to this Act neither the mortgagor nor the mortgagee could make a lease which would be binding on the other (*Keech v. Hall*, 1 Dougl. 21; Coote on Mortgages, 4th Edit. 709, 740), unless it seems there is an absolute necessity on the part of the latter to grant a lease (*Hungerford v. Clay*, 9 Mod. 1).

Powers of  
leasing.

This section confers upon a mortgagor or mortgagee in possession a power to make certain leases of the mortgaged land, and it is to be observed that this statutory power of leasing is applicable to all mortgages made after the commencement of the Act unless a contrary intention is expressed in the mortgage deed (see sub-sect. 13). The section should therefore be expressly excepted if it is deemed advisable to exclude the power.

As to the meaning of "incumbrancer," see sect. 2 (vii.).

Note to S.18,ss.1. If the lease of the mortgaged land is not made "as is in this section described and authorized," it would seem that the Act would not apply.

Applica-  
tion of  
Act.

(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid.

(3.) The leases which this section authorizes are—

(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and

(ii.) A building lease for any term not exceeding ninety-nine years.

(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days.

(8.) A counterpart of every such lease shall be Sect. 18. executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connection with building purposes.

For the definition of "building lease," see sect. 2 (x.).

(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

A counterpart of the lease executed by the lessee is to be Counter-  
delivered to the mortgagee by the mortgagor within one <sup>part of</sup> month of its being made. <sub>lease.</sub>



Sect. 18. (12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

Contrary intention. It will be advisable before taking a lease to ascertain whether there is any contrary intention expressed which would exclude the application of this section, for it applies only if a contrary intention is not expressed by the mortgagor or mortgagee in the mortgage deed, or *otherwise in writing*.

(14.) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of, leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exerciseable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

(15.) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence



of all the incumbrancers, if this Act had not Sect. 18. been passed.

(16.) This section applies only in case of a mortgage made after the commencement of this Act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.

*Sale; Insurance; Receiver; Timber.*

**19.**—(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely) : Powers incident to estate or interest of mortgagee.

- (i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public

Sect. 19.

auCTION or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby ; and

(ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money ; and

(iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof ; and

(iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contracts for any such cutting and sale, to be completed within any time

not exceeding twelve months from the Sect. 19.  
making of the contract.

(2.) The provisions of this Act relating to the foregoing powers, comprised either in this section or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

(4.) This section applies only where the mortgage deed is executed after the commencement of this Act.

This section provides that in mortgages made after the Mort-  
31st of December, 1881, a mortgagee shall, if a contrary <sup>gaggee's</sup> intention is not expressed, have the following powers:— powers.

(1.) When the mortgage money has become due, to sell by public auction or private contract, subject to such conditions as he thinks fit, with power to buy in at an auction, to vary or rescind any contract and re-sell without being answerable for loss; (2.) At any time after date of mortgage to insure the mortgaged property, and add premiums to principal which shall be a charge on the property with interest at same rate; (3.) When mortgage money has become due to appoint a receiver; and (4.) While the mortgagee is in possession to cut and sell timber, or to contract for any such cutting and sale, to be completed within twelve months from the making of contract. These powers,

**Note to Sect. 19.** and those contained in any subsequent sections regulating the exercise thereof, may be varied or extended by the mortgage deed, and shall operate as if such variations or extensions were contained in this Act.

“Mortgagee.” The term “mortgagee” includes any person from time to time deriving title under the original mortgagee, sub-sect. 2 (vi.) ; and it is therefore anticipated that the powers contained in this section can be exercised by an assignee, sect. 21, sub-sect. 4, and sect. 27, sub-sect. 2 : and as to the provisions usually inserted in mortgage deeds, now conferred by statute, see sects. 26 and 61.

**Insurance.** With reference to the mortgagee’s power of insuring under sub-sect. 2, the amount and application of the insurance money is specified in sect. 23 ; and as to the rights of a receiver to insure, see sect. 24, sub-sect. 7.

It is to be observed that the necessity of inserting a covenant by the mortgagor to insure is not precluded by the statutory power contained in this section. The ordinary covenants in this respect in a mortgage deed being (1) the mortgagor’s covenant to insure, and (2) a power for mortgagee to insure on default, and a proviso that the mortgagor will repay *on demand* the money expended in premiums and interest thereon to the mortgagee, and that until such repayment the same shall be a charge on the land.

**Timber.** As to what the term “timber” comprises, see *Honywood v. Honynwood*. L. R. 18 Eq. 306. As to the meaning of “ornamental timber,” see *Baker v. Sebright*, 13 Ch. D. 179 ; with respect to the right and power of cutting timber when the mortgagees are in possession, see *Simmins v. Shirley*, 6 Ch. D. 173.

**Mines.** The Act apparently makes no alteration with regard to the opening and working of mines, for which, see Fisher on Mortgages, 3rd Edit. 949.

**Regulation of exercise of power of sale.** **20.** A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

(i.) Notice requiring payment of the mortgage

money has been served on the mortgagor Sect. 20.  
or one of several mortgagors, and default  
has been made in payment of the mort-  
gage money, or of part thereof, for three  
months after such service; or

- (ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or
- (iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

The power of sale conferred by the Act may be exercised Exercise of power of sale.  
by the mortgagee :—(1) three months after notice requiring payment of mortgage debt; or (2) where some interest has been in arrear for two months; or (3) where there has been a breach of some provision contained in the mortgage deed or in the Act on the part of the mortgagor.

The notice must be in writing. As to the regulations Notice.  
respecting notice, see sect. 67; and see also sect. 2 (xvi).

“Month” means a calendar month. 13 & 14 Vict. c. 21, Month.  
s. 4; *Anon.*, *Barnardiston*, C. C. 324; 2 Eq. Ca. Abr.  
605; *Freeman v. Read*, 4 B. & S. 174.

**21.**—(1.) A mortgagee exercising the power Convey-  
ance, re-  
ceipt, &c.,  
on sale.  
of sale conferred by this Act shall have power, by  
deed, to convey the property sold, for such estate  
and interest therein as is the subject of the mort-  
gage freed from all estates, interests, and rights to

Sect. 21. which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage ; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf.

Estate and interest vested in purchaser by 23 & 24 Vict.c.145, s. 15. By Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 15, the person exercising the power of sale had power by deed to convey or assign to and vest in the purchaser the property sold for all the estate and interest therein which the person who created the charge had power to dispose of, except that in the case of copyhold hereditaments the beneficial interest only should be conveyed to and vested in the purchaser by such deed. A mortgagee under this section has only power to convey the property "for such estate and interest therein as is the subject of the mortgage." See *Hiatt v. Hillman*, 19 W. R. 694.

By this section.

(2.) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised ; but any person damnified by an unauthorized, improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(3.) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him,

first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof. Sect. 21.

As to discharge of incumbrances on sale, see sect. 5.

Where real and personal estate are mortgaged together the mortgagees should require the mortgagor to point out clearly the person who is to receive the surplus proceeds of sale in order that they may not be involved in any question which may arise between his heir and executor as to the division of such mixed surplus. *Day. Conv.*, 4th Edit., Vol. I., p. 258 n.

(4.) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(5.) The power of sale conferred by this Act shall not affect the right of foreclosure.

(6.) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

(7.) At any time after the power of sale conferred by this Act has become exercisable, the person entitled to exercise the same may demand and recover from any person, other than a person



Sect. 21. having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

Mort-  
gagee's  
receipts,  
discharges,  
&c.

**22.**—(1.) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder ; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

(2.) Money received by a mortgagee under his mortgage, or from the proceeds of securities comprised in his mortgage, shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act ; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

Mort-  
gagee's  
receipt in  
writing.

This section provides that the receipt in writing (sect. 2 (xvi.)) of a mortgagee (sect. 2 (vi.)) is a sufficient discharge for any money or securities arising under the power of sale comprised in a mortgage ; and the mortgagee therefore will be the person entitled to exercise the power of sale conferred by this Act (sect. 21, sub-sect. 4). As to the



person entitled to exercise the power when the mortgage money has been advanced on a joint account or in distinct sums, see sects. 28 and 61. Note to Sect. 22.

The section further provides that a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether anything is owing on the security. As to inquiry by purchaser.  
As to this, see *Dicker v. Angerstein*, 3 Ch. D. 600, in which the usual clause relieving the purchaser from making inquiry was held effectual. The difficulties of a mortgagee selling under a power of sale, which contains no provision protecting the purchaser from seeing that default has been made in payment of the mortgage money, are shown in the case of *Hobson v. Bell*, 2 Beav. 17: Dav. Conv., Vol. II., Part II., 4th Edit. 79.

**23.**—(1.) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured. Amount and application of insurance money.

The amount and application of the insurance money is set out in this section (and see sect. 19, sub-sect. 2, with reference to the power conferred upon the mortgagee to insure). The mortgagee has power under this section either to apply the insurance money in making good the damage incurred or in discharge of the money due under his mortgage. This provision seems to press hardly on the mortgagor as in some cases he may have the means of paying the interest which becomes due on the mortgage, but yet be unable to incur the expenses of rebuilding the premises. Amount and application of insurance money.

It may, therefore, be deemed advisable to insert the stipulation that the insurance money shall be applied in reinstating the buildings, and to exclude by special contract, the operation of the act (sub-sect. 4).

Sect. 23. (2.) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely) :

- (i.) Where there is a declaration in the mortgage deed that no insurance is required :
- (ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed :
- (iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorized to insure.

(3.) All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4.) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage.

Metropo-  
litan  
Building  
Act.

By the provisions of the Metropolitan Building Act, 14 Geo. 3, c. 78, s. 83, the insurance offices upon the request of any person interested in any building destroyed by fire, are bound in certain cases to cause the insurance money to be laid out in rebuilding or reinstating the property. This would be an "obligation to the contrary imposed by law" referred to in sub-sect. 4. See also the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43).

**24.**—(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver. Sect. 24.  
Appoint-  
ment,  
powers,  
remunera-  
tion, and  
duties of  
receiver.

This section takes the place of, and to a certain degree extends the powers conferred upon receivers under Lord Cranworth's Act (23 & 24 Vict. c. 145), ss. 11-30, which sections are repealed by sect. 71 of this Act. Receivers.

Sub-sect 1 provides that a mortgagee entitled to appoint a receiver under the power conferred by this Act (sect. 19) shall not make such appointment until he has become entitled to exercise the power of sale (see sect. 20). Appoint-  
ment of  
receiver.

The mortgagee by virtue of sect. 20, sub-sect. 2, cannot appoint a receiver until some interest under the mortgage is in arrear for two months, whereas when a receiver is appointed in a mortgage deed it is the usual practice to insert a stipulation that the receiver should not act unless the interest is in arrear, and consequently the provision contained in this Act as compared with that usually inserted in a mortgage deed favours the mortgagor rather than the mortgagee.

For the distinction between a "receiver" and a "manager," see *In re Manchester and Milford Railway Co.*, 14 Ch. D. 653. Distinc-  
tion be-  
tween  
receiver  
and  
manager.

The rule, before the Judicature Act, was that if the mortgagee having the legal estate neglected to take the precaution of an agreement with the mortgagor for the appointment of a receiver, he could not obtain such appointment by order of court. *Berney v. Sewell*, 1 J. & W. 647.

By the Judicature Act, 1873, sect. 25, sub-sect. 8, a receiver may be appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just.

**Note to S. 24, ss. 1.** Under this section the appointment of a receiver was extended to the whole property comprised in the security, as to part of which the incumbrancer was a legal, and as to part an equitable mortgagee. Coote on Mortgages, 4th Edit. 1118 ; *Pease v. Fletcher*, 1 Ch. D. 273.

**Application of surplus rents.** As to the application of surplus rents in the hands of a receiver appointed by deed where there is a second mortgage, and as to the rights of the second mortgagee where payments are made by the receiver to the first mortgagee in excess of his interest, see *Law v. Glenn*, L. R. 2 Ch. App. 634. Dav. Conv., 4th Edit., Vol. II., Part II. 104.

(2.) The receiver shall be deemed to be the agent of the mortgagor ; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5.) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

(6.) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commis-

sion at such rate, not exceeding five per centum Sect. 24.  
on the gross amount of all money received, as is  
specified in his appointment, and if no rate is so  
specified, then at the rate of five per centum on  
that gross amount, or at such higher rate as the  
Court thinks fit to allow, on application made by  
him for that purpose.

(7.) The receiver shall, if so directed in writing  
by the mortgagee, insure and keep insured against  
loss or damage by fire, out of the money received  
by him, any building, effects, or property com-  
prised in the mortgage, whether affixed to the  
freehold or not, being of an insurable nature.

(8.) The receiver shall apply all money received  
by him as follows (namely) :

- (i.) In discharge of all rents, taxes, rates, and  
outgoings whatever affecting the mort-  
gaged property ; and
- (ii.) In keeping down all annual sums or other  
payments, and the interest on all prin-  
cipal sums, having priority to the mort-  
gage in right whereof he is receiver ; and
- (iii.) In payment of his commission, and of the  
premiums on fire, life, or other insu-  
rances, if any, properly payable under the  
mortgage deed or under this Act, and  
the cost of executing necessary or proper  
repairs directed in writing by the mort-  
gagee ; and
- (iv.) In payment of the interest accruing due

Sect. 24.  

---

in respect of any principal money due under the mortgage ;

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

*Action respecting Mortgage.*

Sale of  
mortgaged  
property in  
action for  
fore-  
closure, &c.

**25.**—(1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure performance of the terms.

(3.) But, in an action brought by a person interested in the right of redemption and seeking a

sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them. Sect. 25.

(4.) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

(5.) This section applies to actions brought either before or after the commencement of this Act.

(6.) The enactment described in Part II. of the Second Schedule to this Act is hereby repealed. 15 & 16  
Vict. c. 86,  
s. 48.

(7.) This section does not extend to Ireland.

This section repeals section 48 of the Chancery Procedure Amendment Act, 1852 (15 & 16 Vict. c. 86), which gave the Court power in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee, or any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, to direct a sale of such property instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit; and if the Court shall so think fit, without previously determining the priority of incumbrances, or giving the usual or any time to redeem, provided that if such request shall be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the Court shall not direct any such sale without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in Court a reasonable sum of money, to be fixed by the Court, for the Sale of  
mortgaged  
property in  
fore-  
closure ac-  
tion.



**Note to S.25,ss.7.** purpose of securing the performance of such terms as the Court may think fit to impose on the party making such request.

This section is, in reality, a re-enactment, in an extended form, of the repealed section.

As a general rule, the mortgagor and all persons having any interest in the equity of redemption are "persons entitled to redeem" under sub-sect. 1 (Seton, 1051; and see sect. 16, *supra*); and all persons having an interest in the mortgage security or equity of redemption should be made parties to the action.

**Parties to action.** It may be convenient to state a few of the principal decisions on the repealed section, which are, to a great extent, authorities upon the present section. The Court has a discretionary power in directing a sale. In *Hutton v. Sealey*, 6 W. R. 350, it was held that, although the mortgage deed contained an express power of sale and foreclosure was not prayed for in the bill, a sale might, under that section, be directed (and see *Macrae v. Ellerton*, 4 Jur. N. S. 967); but it must not operate injuriously or oppressively on any persons interested (*Hurst v. Hurst*, 16 Beav. 372).

**Decisions on sect. 48 of 15 & 16 Vict. c. 86.** The Court may direct a sale, although the third incumbrancer refuses, if the rest consent (*Wickham v. Nicholson*, 19 Beav. 38); and at the request of the mortgagee, if the mortgagor be bankrupt (*Cator v. Reeves*, 9 Ha. App. liii. n.; 16 Jur. 1004); and in the absence of the mortgagor, against whom the action has been taken *pro confesso* (*Woodford v. Brooking*, L. R. 17 Eq. 425; but see *Jones v. Bailey*, 17 Beav. 582) Coote on Mortgages, 4th Edit. 999; also when it may be beneficial for an infant mortgagor (*Mears v. Best*, 10 Ha. App. li.; *Wigham v. Measor*, 5 W. R. 394; *Siffken v. Davis*, Kay, App. xxi.), or where the rents are not sufficient to keep down the interest on the first mortgage (*Phillips v. Gutteridge*, 4 De G. & Jo. 531); and without the consent of the mortgagor (*Newman v. Selfe*, 33 Beav. 522); and also where leasehold property is unlet and cannot be let and is consequently unproductive (*Foster v. Harvey*, 4 De G. J. & S. 59); but not if the property is likely to be sold for less than its value (*Hurst v. Hurst*, 16 Beav. 372).

**Power of court to sell in foreclosure action.**



The deposit (see sub-sect. 2) must be sufficient to cover, **Note to S.25,ss.7.**  
 at a rough estimate, all possible expenses of an abortive attempt at a sale (*Bellamy v. Cockle*, 2 W. R. 326); and a reserved bidding to be fixed sufficient to cover the amount found due to the plaintiffs, the mortgagees (*Whitfield v. Roberts*, 5 Jur. N. S. 113). **Deposit.**

An immediate sale is not generally ordered except under special circumstances, but a period of six months is the usual time (*Lloyd v. Whittey*, 17 Jur. 754; *Seton*, 1047). **Time for redemption.**

## V.—STATUTORY MORTGAGE.

**26.**—(1.) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in the form given in Part I. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto. **Form of statutory mortgage in schedule**

(2.) There shall be deemed to be included, and there shall by virtue of this Act be implied, in the mortgage deed—

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely):

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six

Sect. 26.      calendar months from the day stated for payment of the mortgage money :

Secondly, a proviso to the effect following (namely):

That if the mortgagor, on the stated days, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall re-convey the mortgaged property to the mortgagor, or as he shall direct.

Form of statutory mortgage.      The form of statutory mortgage set out in the Third Schedule, Part I. of this Act, is concise, and can be adopted in simple mortgages of land, with such variations and additions as circumstances may require (sub-sect. 1). By this section the covenants for payment of principal and interest in the usual way, and a proviso for the re-conveyance of the mortgaged property to the mortgagor, or as he shall direct (sect. 15, sub-sect. 1), are implied ; general words, sect. 6 ; covenants for title are implied by sect. 7 ; the ordinary powers incident to the estate or interest of a mortgagee, viz., power of sale, to insure, to appoint a receiver, and to cut timber are conferred by sects. 19—24 ; by sect. 28, implied covenants are deemed to be joint and several. Under sects. 58 and 59, covenants bind the “heirs and assigns” or “executors, administrators, and assigns,” as the case may require ; sect. 63 provides for “all the estate” clause ; and by sect. 64, the words in implied covenants and provisos are construed as meaning the singular or plural number, or the masculine or feminine gender, as the case may require.

Forms of statutory transfer of mortgage in schedule.      **27.—(1.)** A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in

such one of the three forms (A.) and (B.) and (C.) Sect. 27.  
given in Part II. of the Third Schedule to this  
Act as may be appropriate to the case, with such  
variations and additions, if any, as circumstances  
may require, and the provisions of this section  
shall apply thereto.

(2.) In whichever of those three forms the deed  
of transfer is made, it shall have effect as follows  
(namely) :

(i.) There shall become vested in the person to  
whom the benefit of the mortgage is ex-  
pressed to be transferred, who, with his  
executors, administrators, and assigns, is  
hereafter in this section designated the  
transferee, the right to demand, sue for,  
recover, and give receipts for the mort-  
gage money, or the unpaid part thereof,  
and the interest then due, if any, and  
thenceforth to become due thereon, and  
the benefit of all securities for the same,  
and the benefit of and the right to sue  
on all covenants with the mortgagee,  
and the right to exercise all powers of  
the mortgagee :

(ii.) All the estate and interest, subject to re-  
demption, of the mortgagee in the mort-  
gaged land shall vest in the transferee,  
subject to redemption.

(3.) If the deed of transfer is made in the form  
(B.), there shall also be deemed to be included,  
and there shall by virtue of this Act be implied  
therein, a covenant with the transferee by the

Sect. 27. person expressed to join therein as covenantor to the effect following (namely):

That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof, at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

(4.) If the deed of transfer is made in the form (C.), it shall, by virtue of this Act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto, accordingly; but it shall not be liable to any increased stamp duty by reason only of it being designated a mortgage.

Form of  
statutory  
transfer of  
mortgage.

The three forms (A.), (B.), and (C.) of a statutory transfer of mortgage are applicable to the following cases:—(1.) Where the mortgagee makes a simple transfer to the transferee, the mortgagor not joining; (2.) Where there is a transfer in which the mortgagor enters into fresh covenants for payment of the principal and interest; and (3.) Where the mortgagor joins and conveys to the transferee, and which operates not only as a transfer of mortgage but also as a new mortgage to the transferee.

The statutory form (C.) of transfer, it is to be observed, sufficiently expresses an intention to keep the original

mortgage alive for the purpose of protecting the purchaser **Note to**  
 against mesne incumbrances : *Adams v. Angell*, 5 Ch. **S.27,ss.4.**  
 D. 634.

It is advisable that the transferee of a mortgage should Mortgagor  
 make the mortgagor a party to the deed, if his concurrence a party.  
 can be obtained, for the purpose of admitting that the  
 mortgage debt is still owing.

When the deed of transfer is made in the form (C.) it is Stamp  
 not liable to any increased stamp duty, by reason only of duty.  
 it being designated a mortgage. So it was decided in *Wale*  
*v. Commissioners of Inland Revenue*, L. R. 4 Ex. D. 270,  
 where an instrument being in substance a "transfer of a  
 mortgage" within the meaning of the Stamp Act, was held  
 liable to be stamped as a transfer and not as a mortgage.

The recital in form (C.)—"And whereas, B. is seized in  
 fee simple of the land comprised in the said mortgage, sub-  
 ject to that mortgage,"—seems to be inserted in the deed  
 so as to gain the benefit conferred by sect. 2, sub.-sect. 2, of  
 the Vendor and Purchaser Act, 1874 ; *Bolton. v London*  
*School Board*, 7 Ch. D. 766 ; and see sect. 3, sub.-sect. 3,  
*supra*, by which recitals contained in the abstracted instru-  
 ments of documents forming part of the prior title are to be  
 assumed by the purchaser to be correct unless the contrary  
 appears.

**28.** In a deed of statutory mortgage, or of Implied  
 statutory transfer of mortgage, where more per- covenants,  
 sons than one are expressed to convey as mort- joint and  
 gagors, or to join as covenantors, the implied several.  
 covenant on their part shall be deemed to be a  
 joint and several covenant by them ; and where  
 there are more mortgagees or more transferees  
 than one, the implied covenant with them shall be  
 deemed to be a covenant with them jointly, unless  
 the amount secured is expressed to be secured to  
 them in shares or distinct sums, in which latter  
 case the implied covenant with them shall be

**Sect. 28.** deemed to be a covenant with each severally in respect of the share or distinct sum secured to him.

**Implied covenants, joint and several.** By this section when the mortgagors are more than one in number the implied covenant on their part is joint and several, and every mortgagor is held to have received the whole amount of the money advanced; but when the mortgagees or transferees are more than one in number, the implied covenant with them is a joint covenant, unless the mortgage debt is secured to them in distinct sums, in which case the implied covenant with them is deemed a covenant with each severally in respect of the distinct sum secured to him.

**Form of re-conveyance of statutory mortgage in schedule** **29.** A re-conveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory re-conveyance of mortgage, being in the form given in Part III. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require.

**Statutory re-conveyance of mortgage.** The form of a deed of statutory re-conveyance of mortgage set out in the Third Schedule, Part. III., can be used only in a very simple case, and that that was the intention of the legislature appears from the words used in this section, viz., "with such variations and additions, if any, as circumstances may require." These words would also permit the statutory form of re-conveyance, with the necessary alterations, to be by indorsement on the mortgage deed.

As C. in the statutory form is expressed to convey as mortgagee, there will be an implied covenant against incumbrances. See sect. 7, sub-sect. 1 (F.).

## VI.—TRUST AND MORTGAGE ESTATES ON DEATH.

**Devolution of trust and mortgage** **30.—(1.)** Where an estate or interest of inheritance, or limited to the heir as special occu-

pant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative, from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative, from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

(2.) Section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed.

37 & 38  
Vict. c. 78.  
38 & 39  
Vict. c. 87.

(3.) This section, including the repeals therein, applies only in cases of death after the commencement of this Act.

This section repeals the 4th section of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), which provided that the legal personal representatives of a mortgagee of a freehold or copyhold estate to which the mortgagee shall

Devolution  
of trust and  
mortgage  
estates.



**Note to S.30,ss.3.** have been admitted, might, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage was in form an assurance subject to redemption, or an assurance upon trust; and also repeals the 48th section of the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), which is as follows:—Section 5 of the Vendor and Purchaser Act, 1874, shall be repealed on and after the commencement of this Act, except as to anything duly done thereunder before the commencement of this Act; and, instead thereof, be it enacted that, upon the death of a bare trustee intestate as to any corporeal or incorporeal hereditaments of which such trustee was seized in fee simple, such hereditaments shall vest like a chattel real in the legal personal representative from time to time of such trustee; but the enactment of this section, substituted for the afore-said section of the Vendor and Purchaser Act, 1874, shall not apply to lands registered under this Act.

Alteration  
made by  
Act.

An important alteration is made by this section in the law as to the devolution of trust and mortgage estates in cases of death after the 31st December, 1881, so that trust and mortgage estates will, upon any death after that date, notwithstanding any testamentary disposition, vest in the personal representatives like a chattel real, with all the like incidents, rights, equities, and obligations, and the personal representatives will be deemed his heirs and assigns within the meaning of all trusts and powers.

The expression, “notwithstanding any testamentary disposition,” makes the section imperative.

As to the statutory power to convey given to the personal representatives of a vendor dying before completion of contract, see sect. 4.

## VII.—TRUSTEES AND EXECUTORS.

Appoint-  
ment of  
new  
trustees,  
vesting of

**31.**—(1.) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires



to be discharged from the trusts or powers reposed Sect. 31.  
 in or conferred on him, or refuses or is unfit to <sup>trust pro-</sup>  
 act therein, or is incapable of acting therein, then <sup>erty, &c.</sup>  
 the person or persons nominated for this purpose  
 by the instrument, if any, creating the trust, or if  
 there is no such person, or no such person able  
 and willing to act, then the surviving or continu-  
ing trustees or trustee for the time being, or the  
 personal representatives of the last surviving or  
 continuing trustee, may, by writing, appoint  
 another person or other persons to be a trustee or  
 trustees in the place of the trustee dead, remain-  
 ing out of the United Kingdom, desiring to be  
 discharged, refusing or being unfit, or being in-  
 capable, as aforesaid.

The provisions contained in this and the following sec- <sup>Appoint-</sup>  
 tions were, to a great extent, embodied in sects. 11 to 30 <sup>ment of</sup>  
 of Lord Cranworth's Act (23 & 24 Vict. c. 145), which <sup>new trust-</sup>  
 are repealed by sect. 71 of this Act. Certain powers and <sup>tees</sup>  
 provisions, which were omitted in that Act, are now pro-  
 vided for in this enactment, such as the case of a trustee <sup>Residence</sup>  
 remaining out of the United Kingdom for more than <sup>abroad.</sup>  
 twelve months (sub-sect. 1), for prior to this Act it was  
 held that the residence abroad of a trustee was not in  
 itself a sufficient cause for appointing another in his place.  
*Re Moravian Society*, 26 Beav. 101; *Withington v. With-*  
*ington*, 16 Sim. 104; but see *Mennard v. Welford*, 1 Sm.  
 & G. 426.

The expression "where a trustee is dead" is explained  
 by sub-sect. 6 as including the case of a person nominated  
 trustee in a will, but dying before the testator; and the  
 the expression "a continuing trustee," as including a re-  
fusing or retiring trustee, if willing to act in the execution  
of the provisions of this section.

Expenses incurred in the appointment of new trustees  
 are usually borne by the trust estate.

Sect. 31. (2.) On an appointment of a new trustee, the number of trustees may be increased.

(3.) On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.

Whether original number of trustees must be adhered to.

The courts have held that it is not necessary to adhere to the original number of trustees appointed, and have allowed two trustees to be appointed in the place of three (*Bulkeley v. Earl of Eglinton*, 1 Jur. (N.S.) 994); and two trustees instead of one (*Re Tunstall*, 4 De G. & Sm. 421; *In re Breary*, W. N., 1873, p. 48); but would not, as a rule, appoint an only trustee (*Grant v. Grant*, 6 N. R. 347).

It is to be observed that by sub-sect. 3 there must be at least two trustees to perform the trust, except where only one trustee was originally appointed, before a trustee can be discharged under this section from his trust.

(4.) On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

As to the vesting of trust property in new or continuing trustees, see sect. 34.

(5.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him,

shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust. Sect. 31.

As to the powers of a new trustee appointed by the court with respect to trust property before it is legally vested in him, see sect. 33. Powers of new trustee.

(6.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(8.) This section applies to trusts created either before or after the commencement of this Act.

It is important to notice that this section applies, unless a contrary intention is expressed, to trusts created either before or after the commencement of this Act.

**32.**—(1.) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting Retirement of trustee.

**Sect. 32.** in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

Retire-  
ment of  
trustee.

This section provides that where there are more than two trustees, one of them, unless a contrary intention is expressed, may by deed be discharged from the trust without any new trustee being appointed in his place. It is to be noticed that there must be more than two trustees, and before a trustee can avail himself of the operation of this section the consent by deed of his co-trustees to the retirement must be obtained, whereas, by sect. 31, a trustee may be appointed by writing (sect. 2, xvi.).

Vesting of  
trust pro-  
perty.

By sect. 34, sub-sect. 2, it is provided that the declaration in a deed discharging a trustee will, without any conveyance or assignment, vest the trust property in the continuing trustees alone as joint tenants; but should the trust property comprise any of the estates and interests excepted from the operation of that section (see sect. 34, sub-sect. 3), it will be necessary that a deed of conveyance or transfer should be executed in the ordinary way.

(2.) Any assurance or thing requisite for vesting the trust property in the continuing trustee alone shall be executed or done.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4.) This section applies to trusts created either before or after the commencement of this Act.

**33.**—(1.) Every trustee appointed by the Court of Chancery, or by the Chancery Division of the Court, or by any other court of competent jurisdiction, shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

**Sect. 33.**  
Powers of new trustee appointed by court.

(2.) This section applies to appointments made either before or after the commencement of this Act.

This section is in reality a re-enactment of a part of sect. 27 (now repealed, see sect. 71, *post*), of Lord Cranworth's Act (23 & 24 Vict. c. 145), with this alteration, that a trustee appointed by the court now can act before the trust property has become vested in him as if he had been an original trustee. See sect. 31, sub-sect. 5.

**34.**—(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

Vesting of trust property in new or continuing trustees.

By this section it is provided that where, after the 31st December, 1881, a new trustee is appointed by a deed, trust property

Note to S.34,ss.1. containing a declaration that the trust property shall vest in such trustee, such declaration shall, without any conveyance or assignment, vest the property in "the persons who by virtue of the deed become and are the trustees."

property in new or continuing trustees.

It appears to be questionable whether the Act applies to the case of an appointment of a new trustee to act with continuing trustees, because it can scarcely be said that the latter are "persons who by virtue of the deed become and are the trustees for performing the trust," and such declaration as mentioned in this section would therefore have the effect of vesting the whole estate in the new trustees alone.

With respect to the mode of vesting trust estates, see Lewin on Trusts, 7th Edit., ch. XXIV., s. 6. And with regard to the trust property expressly excepted from the operation of this section, see sub-sect. 3, *post*.

It is to be noticed that this section only applies when a trustee is appointed *by deed*, therefore if a trustee has been appointed *by writing* (see sect. 31) it is evident that the section is inapplicable, unless the trustees are re-appointed on their "being desirous of retiring." *In re Crowe's Trusts*, 14 Ch. D. 610.

Stamp.

By sect. 78 of the Stamp Act, 1870 (33 & 34 Vict. c. 97), it is provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than 10s. ; but in the case of *Hadgett v. Commissioners of Inland Revenue*, 3 Ex. D. 46, it was held that an order of charity commissioners, by which new trustees of a charity are appointed, and the property of the charity vested in them, did not come within this proviso, but was chargeable under sect. 8 of that Act.

(2.) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing

trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates. Sect. 34.

As to the retirement of trustees, see sect. 32.

(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.

It is to be noticed that the provisions of this section do not apply to all descriptions of trust property, copyholds, customary lands, lands conveyed by way of mortgage for securing money subject to trusts, and stock transferable in books kept by a company being expressly excluded from the operation of this section. Property excepted from operation of section.

(4.) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5.) This section applies only to deeds executed after the commencement of this Act.

**35.**—(1.) Where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any other person in selling, all or any part of the property, either subject to Power for trustees for sale to sell by auction, &c.



**Sect. 35.** prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss.

**Power for trustees for sale to sell, &c.** This section extends the provisions contained in the 1st and 2nd sections of Lord Cranworth's Act, and as those sections are not repealed by this Act, they will read in conjunction with this section.

By Lord Cranworth's Act it was enacted that :—

23 & 24 Vict. c. 145, ss. 1, 2. Trustees empowered to sell may sell in lots, and either by auction or private contract.

“1. In all cases where by any will, deed, or other instrument of settlement, it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally, or in any particular event, over any hereditaments named or referred to in or from time to time subject to the uses or trusts of such will, deed, or other instrument, it shall be lawful for such trustees or other persons, whether such hereditaments be vested in them or not, to exercise such power of sale by selling such hereditaments either together or in lots, and either by auction or private contract, and either at one time or at several times, and (in case the power shall expressly authorize an exchange) to exchange any hereditaments which for the time being shall be subject to the uses or trusts aforesaid for any other hereditaments in England, or Wales, or in Ireland (as the case may be), and upon such exchange to give or receive any money for equality of exchange.

**Sale may be made under special conditions, and trustees may buy in, &c.**

“2. It shall be lawful for the persons making any such sale or exchange to insert any such special or other stipulations, either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale or exchange, as they shall think fit, and also to buy in the hereditaments or any part thereof at any sale by auction, and to rescind or vary any contract for sale or exchange, and to re-sell the



hereditaments which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby, and no purchaser under any such sale shall be bound to inquire whether the persons making the same may or may not have in contemplation any particular reinvestment of the purchase money in the purchase of any other hereditaments or otherwise.”

Note to  
S.35,ss.1.  
—

And by sect. 32 it was declared that none of the powers conferred by the statute should be exercisable if it was declared in the instrument creating the power that they should not take effect.

It will be noticed on comparison that the power of sale conferred by this section on trustees is with respect to “property,” whereas in Lord Cranworth’s Act (sect. 1) it is in reference to “hereditaments,” *id. est.*, land.

See note to sect. 42, sub-sect. 5 (iii.).

(2.) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3.) This section applies only to a trust or power created by an instrument coming into operation after the commencement of this Act.

It will be observed that this section applies only to a trust or power created by an instrument coming into *operation* after the commencement of this Act, 31st December, 1881, whereas the provisions contained in Lord Cranworth’s Act extended only to persons entitled or acting under an instrument *executed* after the passing of that Act (28th August, 1860). Sect. 34.

**36.**—(1.) The receipt in writing of any trustee or trustee for any money, securities, or other personal property or effects payable, transferable,

Trustees’  
receipts.

**Sect. 37.** or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

Trustees' receipts.

This section, which is retrospective (sub-sect. 2), re-enacts and extends the provisions relating to trustees' receipts contained in sect. 29, of Lord Cranworth's Act (now repealed by sect. 71, *post*), which provided that the receipts in writing of any trustees or trustee for any money payable to them or him by reason or in exercise of any trusts or powers should be good discharges. It will be observed that in that section the words used are "for any money," in this section the words are "for any money, securities, or other personal property or effects."

Application of purchase money.

As to the principle the courts went upon that a purchaser should be required to see to the application of his purchase money, see *Elliott v. Merryman*; White and Tudor's Leading Cases, Vol. I., 4th Edit. 64; and Lewin on Trusts, 7th Edit. ch. XVIII., s. 2. It is anticipated that notwithstanding the powers conferred by this section, it will still be unsafe to pay to a trustee when the holder of the money is aware of the intention of the trustee to commit a breach of trust. See *Fernie v. Maguire*, 6 Ir. Eq. Rep. 137.

Receipts by anticipation.

The power of giving receipts by anticipation is exemplified in the recent case of *Anson v. Potter*, 13 Ch. D. 141, in which it was held that where a fund subject to a life estate is settled, the tenant for life and the trustees of the settled reversion could give a good discharge for it before the reversion fell in.

(2.) This section applies to trusts created either before or after the commencement of this Act.

Power for executors and trustees to

**37.—(1.)** An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2.) An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith. Sect. 37.  
compound,  
&c.

This section is a re-enactment, in an extended form, of sect. 30 of Lord Cranworth's Act (now repealed by sect. 71, *post*). The powers conferred upon executors by the repealed section are now extended to trustees. The word "executor" is substituted for "executors," and the more comprehensive words "debt, or for any property, real or personal," are here inserted instead of the word "debt" in the repealed section. Power for  
executors  
and trustees  
to  
compound,  
&c.

Previously to this Act it was held that a trustee might, under certain circumstances, release or compound a debt, but he was bound to exercise a sound discretion (*Blue v. Marshall*, 3 P. Wms. 381; *Ratcliffe v. Winch*, 17 Beav. 216); but where a trustee releases without any consideration (*Jevon v. Bush*, 1 Vern. 343); or where trustees of a bond debt on the bankruptcy of the obligor concurred with his other creditors in consenting to the fiat being annulled

**Note to S.37,ss.2.** — on the payment of a composition, and it being impossible to show that the bankrupt would have obtained his certificate, or that the debt might not have been recovered in full (*Wiles v. Gresham*, 5 De G. M. & G. 770); or where the debt is sold by the trustee for an inadequate consideration by the trustee (*In re Alexander*, 13 Ir. Ch. Re. 137), it has been held that the trustees were liable to make good the full amount of the debt. Lewin on Trusts, 7th Edit. ch. XXII., s. 1. It is anticipated that, notwithstanding the apparently unlimited power to compromise, &c., conferred upon trustees by this section, a *cestui que trust* will be able to call the trustee to account if his conduct is fraudulently and manifestly injurious to the trust estate.

A trustee is not liable on the ground that he does not accept terms of compromise. *Ex parte Ogle*, L. R. 8 Ch. App. 715.

(3.) As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4.) This section applies to executorships and trusts constituted or created either before or after the commencement of this Act.

It is to be noted that this section is retrospective and differs in this respect from the 30th section of Lord Cranworth's Act, which, by sect. 34 of that Act, extended only to instruments executed after the passing of that Act, *i.e.*, 28th August, 1860. This section is not applicable if a contrary intention is expressed in the instrument creating the trust.

Powers to  
two or  
more  
executors  
or trustees.

**38.—(1.)** Where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in

the instrument, if any, creating the power or trust, Sect. 38.  
the same may be exercised or performed by the  
survivor or survivors of them for the time being.

(2.) This section applies only to executorships and trusts constituted after or created by instruments coming into operation after the commencement of this Act.

Where a power or trust is vested in two or more executors or trustees jointly, the same may, unless the contrary is expressed in the instrument (sect. 2 (xiii.)), be exercised or performed by "the survivor or survivors of them." The frequent repetition of these words will now be done away with.

## VIII.—MARRIED WOMEN.

**39.**—(1.) Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the court to be for her benefit, by judgment or order, with her consent, bind her interest in any property.

Power for court to bind interest of married woman.

(2.) This section applies only to judgments or orders made after the commencement of this Act.

The effect of this section is apparently to reverse the decision of *Robinson v. Wheelwright*, 21 Beav. 214, in which case it was held that where there is attached to the separate estate of a married woman a clause against anticipation, the court has no power to release it from that restraint, even in cases where it would manifestly be for her benefit to do so ; but see *Wilton v. Hill*, 25 L. J. Ch. 156, where it was held that a married woman having property to her separate use, without power of anticipation, had power to bind the corpus of the estate by a compromise entered into by her ; and in *Clive v. Carew*, 1 J. & H. 199, it was held that a

Power of court to bind interest of married woman.

**Note to Sect. 39.** wife's property, settled by herself on marriage to her separate use, without power of anticipation, could not be applied to make good loss occasioned by her own breach of trust in making away with other property in which she had, by the same settlement, reserved to herself a life interest only.

**Court.** As the "Court" is defined as Her Majesty's High Court of Justice (sect. 2 (xviii.)), it is evident that the county courts have no jurisdiction to make an order under this section.

**"For her benefit."** It is thought that an order for payment of debts with her consent (*Lowther v. Bentinck*, L. R. 19 Eq. 166); or money advanced to set up a married woman in business (*Talbot v. Marshfield*, L. R. 3 Ch. App. 622) would probably be included in the expression "for her benefit" within the meaning of this section; and see also *Pike v. Fitzgibbon*, 17 Ch. D. 454.

**Settled Estates Act.** It is to be noticed that under sect. 50 of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), the legislature apparently endeavoured to break up to a certain extent the one exception to the general law that all property should not be inalienable. By that section it is declared that no clause or provision in any settlement restraining anticipation shall prevent the Court from exercising, if it shall think fit, any of the powers given by this Act, and no such exercise shall occasion any forfeiture, anything in the settlement contained to the contrary notwithstanding.

**Power of attorney of married woman.** **40.**—(1.) A married woman, whether an infant or not, shall, by virtue of this Act, have power, as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers of attorney shall apply thereto.

(2.) This section applies only to deeds executed after the commencement of this Act.

This section provides that a married woman, whether an infant or not, may, by deed, executed after the 31st December, 1881, appoint an attorney for the purpose of executing any deed or doing any other act which she might herself execute or do.

**Note to Sect. 40.**  
Powers of attorney of married woman.

In *Kenrick v. Wood*, L. R. 9 Eq. 333, it was held that where a married woman, who was entitled to the income of property held on trust for her separate use, with a restraint on anticipation, joined with her husband in a power of attorney to receive and to sue for any moneys due to them or either of them, the trustee was not justified in paying the attorney the wife's separate income.

The execution of a power of attorney by a grantor should, as a general rule, be attested by two witnesses. The attorney should exercise his powers in the name of his principal, and use and sign his principal's name instead of his own: 9 Co. 76, Stra. 765. As to the execution and attestation of a power of attorney to be exercised in the colonies, see Dav. Conv. L., 4th Edit. 491; and see also 15 & 16 Vict. c. 86, s. 22.

Execution of power of attorney.

*Not made, now see sec 46  
as to power of attorney  
of person  
see 45 & 46  
Vic c. 73  
see 4 -*

As to the provisions of the Act relating to powers of attorney, see sects. 46-48.

## IX.—INFANTS.

**41.** Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877.

Sales and leases on behalf of infant owner.  
40 & 41 Vict. c. 18.

The Settled Estates Act, 1877, enacts that in case of hereditaments of any tenure, or any estate or interest in such hereditaments, limited to or in trust for any persons by way of succession, the Court (i.e., the Chancery Division), may authorise leases of estates so settled subject to certain restrictions as to length of term, amount of rent, and otherwise. Sect. 4.

Settled Estates Act, 1877 (40 & 41 Vict. c. 18).



**Note to  
Sect. 41.**  
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This power of authorising leases may be exercised either by approving particular leases or by vesting powers of leasing in trustees. Sect. 10.

On the execution by the person directed by the Court to execute a particular lease, the lease takes effect as if the person executing were then absolutely entitled to the whole estate or interest which is bound by the settlement. Sect. 12.

When the Court vests the power of leasing in trustees, such power is to operate as if it had been originally contained in the settlement, and if necessary by way of revocation and appointment of the use or otherwise. Sect. 13.

The court may authorise sales of the whole or any part of a settled estate or of the timber (not being ornamental timber) growing on such estate. Sect. 16.

The Court may sanction proceedings for the protection of a settled estate, and may charge the costs of the proceedings on the estate or direct them to be raised by sale or otherwise. Sect. 17.

The Court may reserve a fee farm rent on land sold for building purposes (sect. 18), and may sell the land excepting the minerals (sect. 19), and may authorise the dedication of any part of the estate for roads and other works. Sects. 20, 21.

On such sales or dedications the Court may direct what person or persons shall execute the conveyance, which shall take effect as if made in execution of a power contained in the settlement, and if necessary by way of revocation and appointment of the use or otherwise. Sect. 22.

Sect. 34 gives the Court power to direct the application of the money arising from such sales (*inter alia*), to redeeming land tax, paying off incumbrances, purchasing other hereditaments to be settled to the same uses.

**Effect of  
section.**

This section seems to extend these powers to nearly every interest except that of a lease held at no rent, or for which the consideration is a premium.

**Mode of  
applying to  
the Court.**

It is presumed that the method of application to the Court will be by petition under sect. 23 of the Settled Estates Act, in the manner prescribed by rule 5 of the orders



under the Settled Estates Act, of December, 1878; and not by summons at chambers under sect. 69, sub-sect. 3, of this Act. Note to Sect. 41.

**42.**—(1.) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply. Management of land and receipt and application of income during minority.

This section renders it unnecessary for the future to insert the usual clauses providing for management during minorities in settlement of real estate. See *Dav. Conv. III.*, p. 999, *et seq.* The word settlement seems intended to include will; the more general word instrument is used in sub-sect. 7, and the words “comes into operation,” in sub-sect. 8, seem adapted to the case of a will; unless they are intended to mean “comes into operation as regards the infant’s interest,” so as to apply to the case of an instrument made before the Act; what the term “instrument” includes, see sect. 2 (xiii). Management of land and receipt and application of income during minority.

The method of applying to the court is by summons at chambers. Sect. 69, sub-sect. 3. Mode of applying to Court.

Sect. 42. (2.) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

Sub-sect. 2 enables the trustees "to deal with the land in a proper and due course of management;" whereas the power usually given is to deal with the land as if they were the absolute owners. The difference is not practically great, for the court would no doubt restrain an undue exercise of the power.

Restriction where the infant is impeachable for waste. The last part of the section deals with the case of an infant who is impeachable for waste, and seems practically only to restrict the trustees in pulling down buildings and in cutting timber for sale, except where the timber is usually felled at fixed intervals and forms in fact the crop. See *Honywood v. Honywood*, L. R. 18 Eq. 306; and *Lowndes v. Norton*, 6 Ch. D. 139. As to what is "timber," see note to sect. 19. It should be noticed that this sub-sect. enables the trustees only to continue working mines which have

usually been worked, and not to open new mines ; this is merely the ordinary right of a legal tenant for life : Note to S.42, ss.2.  
 Williams' Real Property, 10th Edit. 24 ; Lewin on Trusts, —  
 ch. XXII., s. 1.

(3.) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise, in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

Sub-sect. 3 gives the power usually inserted in a settlement, but restricted as to outgoings payable by a tenant or other person ; the last part of the exception seems a little vague. What the term "income" comprises see sect. 2 (iii.). Expenses of management, &c.

(4.) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

Sub-sect. 4 providing for maintenance seems to be enacted in a more general form by the next section (sect. 43). The statutory power conferred by sect. 26 of Lord Cranworth's Act is repealed by sect. 71 of this Act. Maintenance.

(5.) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments ; and shall accumulate the

**Sect. 42.** income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments ; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely) :

Invest-  
ments au-  
thorised  
by law.

As to investments authorised by law, see Lewin on Trusts, ch. XVI, s. 4 ; Dav. Conv., III., 3rd Edit. 26 ; and Seton on Degrees, 488.

(i.) If the infant attains the age of twenty-one years, then in trust for the infant ;

(ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge ; but

Trusts of  
the accu-  
mulated  
fund.

The first of the trusts of the accumulations calls for no comment, but the second is a remarkable emancipation of a female infant from the double disability of infancy and coverture.

Should the infant desire to settle the money she may still do so, if above seventeen years of age, by means of the Infants Marriage Settlement Act (18 & 19 Vict. c. 43).

(iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settle-

ment; but where no such trusts are Sect. 42.  
declared, or the infant has taken the  
land from which the accumulated fund  
is derived by descent, and not by pur-  
chase, or the infant is tenant for an  
estate in fee simple, absolute or deter-  
minable, then in trust for the infant's  
personal representatives, as part of the  
infant's personal estate;

but the accumulations, or any part thereof, may  
at any time be applied as if the same were income  
arising in the then current year.

It should be observed that by (iii.) the ultimate trust of  
rents accumulated during a minority is not for the person  
becoming ultimately entitled to the possession of the land,  
but for the personal representative of the infant. This may  
have the effect of changing the destination of such accumu-  
lations in wills or settlements where Lord Cranworth's Act  
has been relied upon, and must be considered in drawing  
settlements in which the powers of sale are supplied by the  
35th section of this Act.

(6.) Where the infant's estate or interest is in  
an undivided share of land, the powers of this  
section relative to the land may be exercised  
jointly with persons entitled to possession of, or  
having power to act in relation to, the other  
undivided share or shares.

Sub-sect. 6 provides for the case of the infant being  
entitled to an undivided share of land.

(7.) This section applies only if and as far as a  
contrary intention is not expressed in the instru-  
ment under which the interest of the infant arises,

**Sect. 42.** and shall have effect subject to the terms of that instrument and to the provisions therein contained.

Sub-sect. 7 enables the settlor or testator to bar the operation of the Act.

(8.) This section applies only where that instrument comes into operation after the commencement of this Act.

Sub-sect. 8, as has already been observed, seems to extend the meaning of the word settlement (see note to sub-sect. 1).

Scope of section.

The section seems only to contemplate the case of an infant entitled to some estate less than a fee simple under some instrument; though *primâ facie* it would seem that the powers of trustees appointed for management of the estate of an infant entitled in fee might well have been as extensive as those of the trustee appointed to manage the estate of an infant tenant in tail.

This section seems to apply only to legal interests in land as is indicated by the words "entitled to the possession." The case of equitable estates is dealt with in the next section.

Applica-  
tion by  
trustees of  
income of  
property  
of infant  
for main-  
tenance,  
&c.

**43.**—(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to

provide for the infant's maintenance or education, Sect. 43.  
or not.

The power of maintenance given by this section is in Main-  
terms wider than those of sect. 26 of Lord Cranworth's <sup>tenance.</sup>  
Act, now repealed by sect. 71, *post*. That Act was held  
only to give a right to maintenance where the infant on  
coming of age would be entitled to the interim profits of  
the property (*In re George*, 5 Ch. D. 837). A like con-  
struction may possibly be given to this section although  
the words "income of the property" are substituted for the Income of  
words, in the repealed section, "income to which such <sup>property.</sup>  
infant may be entitled in respect of" the property. It  
will be necessary to consider in a particular case whether  
there is not an expression of contrary intention within the  
meaning of sub-sect. 3.

Payment to the parent is expressly authorised by *In re* Payment  
*Cotton*, 1 Ch. D. 232, on the ground that the word "guar- <sup>to parents</sup>  
dians" in the 26th section of Lord Cranworth's Act includes <sup>or guar-</sup>  
the father as guardian by nature. <sup>dians.</sup>

The payment may be for the benefit of the infant.

It was held to be for the "benefit" of the *cestui que trust*, <sup>For the</sup>  
in *Lowther v. Bentinck*, L. R. 19 Eq. 166, to pay his debts, <sup>benefit of</sup>  
and no doubt this section will receive as liberal a con- <sup>the infant.</sup>  
struction. See note to sect. 39.

It should be noticed that the power arises only where <sup>When the</sup>  
the contingency is the infant attaining twenty-one, or the <sup>power</sup>  
occurrence of some event before his attaining that age. <sup>arises.</sup>

In a case, therefore, where, as *In re Breed's Will*, 1 Ch. D.  
226, the contingency is attaining twenty-five or marriage,  
the power does not arise at all; and does not merely, like  
the power given by Lord Cranworth's Act, stop at minority.

(2.) The trustees shall accumulate all the  
residue of that income in the way of compound  
interest, by investing the same and the resulting  
income thereof from time to time on securities on  
which they are by the settlement, if any, or by



Sect. 43. law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

For a list of some of the investments authorized by law, see I. Lewin on Trusts, ch. XIV., s. 4; Seton on Degrees, 488.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

Trusts of  
accumu-  
lated fund.

The trusts of the surplus accumulations are, by sub-sect. 3, subject to the terms of the instrument under which the interest of the infant arises; it is presumed that if the trust be, for example, for the infant for life, that would be a sufficient expression of contrary intention, and that it would not be necessary expressly to declare that the accumulation should go to the personal representative of the infant.

(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act.

Sub-sect. 4 makes the section retrospective, so that the power given by this section is substituted for that given by sect. 26 of Lord Cranworth's Act (repealed sect. 71, *post*), in any case to which this section applies.

It is presumed, however, that where a power has actually



come into operation under Lord Cranworth's Act, it will not be affected by this Act. See sect. 71, sub-sect. (2). Note to S.43, ss.4.

## X.—RENTCHARGES AND OTHER ANNUAL SUMS.

**44.**—(1.) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.

This section seems designed to avoid the necessity of inserting in settlements powers of distress and entry, or of creating terms to secure jointures and other annual payments out of the income of land. It applies to annual payments (other than rent incident to a reversion) charged upon land or upon the income of land. Powers of distress, entry, &c.

As to the distinction between annuities charged on land and on the income of land, and the remedies of annuitants, see *Phillips v. Gutteridge*, 3 D. J. & S. 332; *Jarman on Wills*, vol. II., p. 306, note (f); *Seton on Degrees*, 963; and the recent cases of *Gee v. Mahood*, 5 App. Cas. 588, and *Wormald v. Muzeen*, 17 Ch. D. 167 (reversed on Appeal, 29 W. R. 795).

It seems probable that the words in sub-sect. 1, "charged on the land or on the income of the land," mean charged on the income in such a way as to charge the land. Unless the land is charged the powers given by the following Powers only affect the land charged.

Note to S.44, ss. 1. sections cannot operate, for they are all confined to "the land charged."

(2.) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

The powers given by this section are powers to enter and distrain if the annual sum is in arrear for twenty-one days.

(3.) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged, or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by nonpayment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

Power to take possession in case of nonpayment for forty days.

(4.) In the like case the person entitled to the Sect. 44. annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise, for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by nonpayment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed; and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.

Power in the like case (*i.e.*, presumably nonpayment for forty days) to demise the land and pay the annuity, &c., by mortgage or sale of the term thus created.

In sub-sects. (2), (3), and (4) the powers are given to **Arrears.** recover all arrears, but it is presumed that this will not prevent the statutes of limitation from operating.

It may be observed that a covenant for payment is not implied by this section, and the expression of a contrary intention will render the section inapplicable.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instru-

**Sect. 44.** ment under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(6.) This section applies only where that instrument comes into operation after the commencement of this Act.

Redemption of quitrents and other perpetual charges.

**45.**—(1.) Where there is a quitrent, chief-rent, rentcharge, or other annual sum issuing out of land (in this section referred to as the rent), the copyhold commissioners shall at any time, on the requisition of the owner of the land, or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed.

Redemption of quitrents and other perpetual charges.

This is an extension of some of the powers of the copyhold commissioners under 15 & 16 Vict. c. 51, and 21 & 22 Vict. c. 94, to lands which are not copyholds but holden of a manor, or which are otherwise subject to a perpetual rentcharge.

(2.) Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the commissioners.

The owner of the

By sub-sect. (2) the operation of the section seems to be confined to cases where the owner of the rent is entitled to

the rent in fee simple in possession, or empowered to dispose thereof absolutely, or to give a discharge for the capital value of the rent. Note to S.45,ss.2.

(3.) On proof to the commissioners that payment or tender has been so made, they shall certify that the rent is redeemed under this Act; and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent. rent must be absolutely entitled.

(4.) Every requisition under this section shall be in writing; and every certificate under this section shall be in writing, sealed with the seal of the commissioners.

(5.) This section does not apply to tithe rent-charge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or license for building purposes, or to any sum or payment issuing out of land not being perpetual.

By sub-sect. 5 the section is not to apply to tithe rent-charge, to rent reserved on a sale or lease, or made payable under a grant for building purposes, or to any payment not perpetual. Section not to apply to tithes, &c.

These restrictions will leave but a narrow field for the operation of this section; especially if it be incumbent on the person making the requisition to show that the annual sum issuing out of his land was not reserved upon a sale of some kind.

(6.) This section applies to rents payable at, or created after, the commencement of this Act.

The section applies to rents created before as well as after the 31st December, 1881.

(7.) This section does not extend to Ireland.

## XI.—POWERS OF ATTORNEY.

**Sect. 46.**     **46.**—(1.) The donee of a power of attorney may, if he thinks fit, execute or do any assurance, Execution under power of attorney. instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

(2.) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

Execution of deed by an agent.     This section alters the rule stated as settled law in *Lawrie v. Lees*, 14 Ch. D. 249, 256, that where an attorney describes himself as an attorney, and professes to grant as an attorney and execute as an attorney, but does not execute in the name of and on behalf of his principal, that is a bad execution.

The form of power generally given enables the attorney to do any act in the name of the principal, and the principal, and not the attorney, is generally made a party to the deed executed under the power. See *Dav. Conv. I.*, 4th Edit., 43, 475.

This section will probably alter that practice.

The section applies to powers of attorney already created.

**47.**—(1.) Any person making or doing any Payment by attorney under power payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect

of the payment or act by reason that before the Sect. 47. payment or act the donor of the power had died without or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, &c. good. death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

This section extends the indemnity given by Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 26) to any person acting in pursuance of a power of attorney and to the cases of revocation by lunacy, &c. See Lewin on Trusts, ch. XIV. s. 6. Indemnity.

It is, perhaps, doubtful whether lunacy or unsoundness of mind has of itself the effect of revoking a power of attorney, and this section does not enact that it shall have that effect. See *Drew v. Nunn*, 4 Q. B. D. 661.

(2.) But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

Sub-sect. (2) does not affect the right of persons interested in the money to follow it in the hands of the person to whom it is paid, as if he were the original debtor or trustee.

(3.) This section applies only to payments and acts made and done after the commencement of this Act.

**48.**—(1.) An instrument creating a power of attorney, its execution being verified by affidavit, shall be valid and effectual in law as if it had been made and executed by the original instrument. Deposit of original instru-



**Sect. 48.** ments  
creating  
powers of  
attorney. davit, statutory declaration, or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the central office of the Supreme Court of Judicature.

(2.) A separate file of instruments so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

(3.) A copy of an instrument so deposited may be presented at the office, and may be stamped or marked as an office copy, and when so stamped or marked shall become and be an office copy.

(4.) An office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the central office.

(5.) General rules may be made for purposes of this section, regulating the practice of the central office, and prescribing, with the concurrence of the commissioners of Her Majesty's treasury, the fees to be taken therein.

(6.) This section applies to instruments creating powers of attorney executed either before or after the commencement of this Act.

**Custody of documents.** Copies.  
Evidence. This section provides a means of safe custody for the originals of instruments creating powers of attorney, and of producing copies which shall be evidence of the contents of the instrument (not merely of the terms of the power of attorney).



As to the general rules under sub-sect. (5), see sect. 69, **Note to sub-sect. (8), *post.*** **Sect. 48.**

The section applies to instruments executed either before or after the Act.

## XII.—CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

**49.**—(1.) It is hereby declared that the use of the word grant is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal. Use of word grant unnecessary.

(2.) This section applies to conveyances made before or after the commencement of this Act.

This section is merely declaratory of the law (see Dav. Conv., 4th Edit., vol. I., p. 75 ; Williams' R. P., 13th Edit. 203), and will probably not affect the use of the word in practice.

**50.**—(1.) Freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person ; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person. Conveyance by a person to himself, &c.

(2.) This section applies only to conveyances made after the commencement of this Act.

This section is supplementary to sect. 21 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), whereby "any person shall have power to assign personal property now by law assignable, including chattels real, directly to himself and Lord St. Leonards' Act.

**Note to Sect. 50.**

Convey-  
ance by a  
person to  
himself  
and  
another.

another person, or other persons or corporation, by the like means as he might assign the same to another."

This section gives the like power with respect to any freehold hereditament or any chose in action. See sect. 2, (ii.) and (xvii.).

With respect to freeholds the effect is merely to enable the instrument to operate without the help of the Statute of Uses. See Williams' Real Property, 11th Edit., pp. 189, 227.

The latter part of the section enables a husband to convey to his wife, or a wife to her husband, property which he or she might convey to another. It does not extend the wife's power of dealing with her property, nor relieve her from any of the formalities now necessary.

"Him-  
self."

Unless the word "himself" in sect. 21 of Lord St. Leonards' Act includes the assignor's wife, the assignor seemingly has still no power to assign personalty or chattels real to his wife alone or jointly with another, and if he attempts to do so the property will vest entirely in the other person. Williams' Personal Property, 9th Edit. 454; but see *Moyse v. Gyles*, 2 Vern. 385. *Quere*, whether this section applies to a case where a person who owns lands adjacent to the glebe lands sells them to be annexed to the glebe, and has to convey as private person to himself as parson.

There is nothing in the section to prevent personal property vested in the wife from vesting in the husband; the conveyance should therefore state that the property is for her separate use.

"Jointly."

It may be observed that if a technical construction is placed upon the word "jointly," it might have the effect of making this section inapplicable to a conveyance by a man to himself and another as tenants in common, but it is anticipated that the word will not be so construed.

The section applies only to conveyances made after 31st December, 1881.

Words of  
limitation  
in fee or  
in tail.

**51.—(1.)** In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use

the words in fee simple, without the word heirs ; Sect. 51.  
 and in the limitation of an estate in tail, to use  
 the words in tail without the words heirs of the  
 body ; and in the limitation of an estate in tail  
 male or in tail female, to use the words in tail  
 male, or in tail female, as the case requires,  
 without the words heirs male of the body, or heirs  
 female of the body.

(2.) This section applies only to deeds executed  
 after the commencement of this Act.

This section, which applies only to deeds executed after Words of  
 the commencement of the Act, will render the law clear limitation  
 for the future (if it was doubtful before) as to the meaning in fee or  
 of the words fee simple, tail, and tail male or female when in tail.  
 used in a deed as words of limitation.

The effect of this section, in enabling the draftsman to  
 shorten some instruments, may be seen by a comparison of  
 Form IV., Sched. IV., with the forms in *Dav. Conv.*, 3rd  
 Edit., vol. III., pt. II., pp. 1040 and 1196.

The estate to be taken must be clearly marked out, or  
 limited either by the proper words conferring an estate in  
 fee simple, tail, tail male or female, or by the use of the  
 expressions in this section. A conveyance to a man *and*  
*his assigns for ever*, or to a man *and the issue of his body*  
 will not confer a fee simple or estate tail respectively, but  
 a life estate only will be given. *Williams' R. P.*, 10th  
 Edit. 143.

**52.**—(1.) A person to whom any power, Powers  
 whether coupled with an interest or not, is given simply  
 may by deed release, or contract not to exercise, collateral.  
 the power.

(2.) This section applies to powers created  
 by instruments coming into operation either

**Sect. 52.** before or after the commencement of this Act.

Different kinds of powers.

The following exposition of the different kinds of powers is given by JESSEL, M. R., in the case of *Re D'Augibau*, 15 Ch. D. 232 :—"The first power, a power simply collateral, I understand to be a power given to a person who has no interest whatever in the property over which the power is given. The second power, a power in gross, is a power given to a person who has an interest in the property over which the power extends, but such an interest as cannot be affected by the exercise of the power. The most familiar instance is that of a tenant for life with a power of appointment after his death. Then the third kind of power is a power exercisable by a person who has an interest in the property, which interest is capable of being affected, diminished, or disposed of to some extent by the exercise of the power. That power is commonly called a power appendant or appurtenant."

Power simply collateral could not be released.

Before this Act a power simply collateral could not be released or extinguished with respect to land which it affected, and a power to be exercised for the benefit of another could not be released. See notes to *Edwards & Slater, Tudor's Leading Cases*, 3rd Edit. 368.

Power in gross.

A power appendant or in gross might have been released, but apparently a covenant not to exercise a power in gross is void. *Palmer v. Locke*, 15 Ch. D. 294.

Married women.

A married woman may release or extinguish a power under sect. 77 of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), or if the power relates to reversionary personality under *Malins' Act* (20 & 21 Vict. c. 57) by a deed acknowledged in which her husband concurs. It is presumed that these formalities will still be necessary.

Infants.

Powers over personality, collateral or in gross, may be exercised by an infant. Powers over real estate cannot be exercised by an infant, unless the power be expressly made exercisable during minority, nor can an infant exercise a power by will. *Re D'Augibau*, 15 Ch. D. 228.

This section probably enables an infant to release or contract to release any power which he might exercise, but

probably does not add otherwise to the value of an infant's deed or contract. Note to Sect. 52.

This section in no way affects the equitable doctrines as to frauds on powers, as to which see *Aleyn v. Belchier*, 1 White and Tudor's Leading Cases, 4th Edit. 377. Doctrine of fraud on power not affected.

It should be noticed that the marginal note is "powers simply collateral." This will not restrict the meaning of the section. Marginal note.

**53.**—(1.) A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof. Construction of supplemental or annexed deed.

(2.) This section applies to deeds executed either before or after the commencement of this Act.

It is difficult to see what the exact effect of this section will be. It is clearly intended to provide for shortening deeds by omitting recitals which will be convenient enough while the deeds are physically annexed or actually accompany each other; but a deed in which the recitals are implied in this way may, when taken by itself, be very unintelligible, and apparently will give constructive notice of everything in the previous deed. For example, the deeds of statutory transfer of mortgage in the Third Schedule, Part II. (A.), (B.), and (C.) are stated by recital to be supplemental to an indenture of statutory mortgage, and the deed of statutory re-conveyance in Part III. to be supplemental to the transfer of mortgage, which is itself supplemental to the original mortgage deed. Supplemental or annexed deed.

**54.**—(1.) A receipt for consideration money or securities in the body of a deed shall be a sufficient. Receipt in deed sufficient.

Sect. 54. — cient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

(2.) This section applies only to deeds executed after the commencement of this Act.

Receipt in deed.

The existence of a receipt in the body of the deed probably arose from the necessity of preventing the use from resulting for want of consideration. See *Tyrrel's Case*, Tudor's Leading Cases, 3rd Edit. 335.

As the statement of the receipt was very often untrue in fact, and might be shown to be untrue in equity, though not at law, it became customary to indorse another receipt.

Such a receipt was not, either at law or in equity, conclusive evidence of the payment; but the absence of such a receipt was, in equity, notice that the purchase money had not been paid, and thus a subsequent purchaser had notice of a previous vendor's lien. Dart V. & P., 5th Edit. 415, 656, 730; Fisher on Mortgages, 3rd Edit. ss. 907, 949; and see note on next section.

Purchaser must pay only to some one properly authorized. "Securities."

This section does not make it the less necessary for the purchaser to pay the money to some one properly authorized to receive it. See Dart V. & P., 5th Edit. 656; *Ex parte Swinbanks*, 11 Ch. D. 525; and sect. 56, *post*.

The section includes the case of a receipt given for "securities" as well as consideration money. In the next section dealing with receipts the phrase is varied, from which it seems that the securities need not be the consideration.

Securities include stocks, funds, and shares. Sect. 2 (xiv.).

It is to be observed that in the recent case of *Ex parte Charing Cross Advance and Deposit Bank*, 16 Ch. D. 35, a question arising as to whether a bill of sale could be supplemented or corrected by the receipt which was subscribed at the foot of the deed, it was held that the indorsed receipt was not part of the deed, and could not be looked at as a statement of the consideration.

**55.**—(1.) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof. Sect. 55.  
Receipt in deed or indorsed, evidence for subsequent purchaser.

(2.) This section applies only to deeds executed after the commencement of this Act.

This section does away with the equitable doctrine referred to in the notes to the last section, that the absence of an indorsed receipt gave constructive notice of a previous vendor's lien. It does not alter the effect of actual notice, and probably would not relieve a purchaser from the constructive notice given by an unusual form of receipt or other circumstance which would cause suspicion, as in *Kennedy v. Green*, 3 M. & K. 699. Absence of indorsed receipt no notice of vendor's lien.

Either a receipt in the body of the deed or an indorsed receipt is to protect the subsequent purchaser, if he has not notice that the money was not paid. Notice must mean notice other than that given by the absence of a receipt, or the apparent object of the section fails.

It should be noticed that the word "purchaser" is used, which would include a purchaser who has not got the legal estate. See sect. 2 (viii). "Purchaser."

It is presumed that sufficient evidence must mean conclusive evidence.

In any case the practical effect of sects. 54 and 55 will be to make it much more unsafe for a vendor to part with the conveyance before he has been paid the purchase money.

**56.**—(1.) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other con- Receipt in deed or indorsed, authority



**Sect. 56.** for payment to solicitor. consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

Solicitor is now authorized to receive purchase money. This section alters the rule laid down in *Viney v. Chaplin*, 2 D. G. & J. 468, recently followed in *Ex parte Swinbanks*, 11 Ch. D. 525, that the vendor's solicitor is not, by the mere possession of the conveyance executed by the vendor, authorized to receive the purchase money.

The words of the section extend to any solicitor, not merely the vendor's, and apply to the receipt of any consideration.

"Consideration." The section does not seem to apply to any payments other than the consideration.

The provisions contained in sects. 54—56 may possibly promote despatch of business, but it appears to be questionable whether that advantage will compensate for the non-requirement of an indorsed receipt and a special authority, which have in practice often proved valuable safeguards to a vendor or mortgagor. It will be observed, however, that a purchaser can have the execution of the conveyance attested by his solicitor or other person appointed by him, but it will be at his own cost. See sect. 8.

(2.) This section applies only in cases where consideration is to be paid or given after the commencement of this Act.

The consideration "is to be" paid or given after the commencement of the Act. The words seem to confine the section to payments the time of which, as fixed by the

contract, is after 31st December, 1881, independently of the date of the deed. Note to S.56, ss.2.

**57.**—Deeds in the form of and using the expressions in the forms given in the fourth schedule to this Act, or in the like form or using expressions to the like effect, shall, as regards form and expression in relation to the provisions of this Act, be sufficient. Sufficiency of forms in fourth schedule.

The use of the forms in the third schedule is authorized by sects. 26, 27, and 29. This section gives a sanction to those in the fourth schedule, and adds that deeds in the “like” form or using expressions “to the like effect” shall be “sufficient” for the purposes of the Act. The use of the words “as beneficial owner” implies covenants for title (see sect. 7); the word “convey” is substituted for grant (sect. 49); general words and “all the estate” clause are implied by sects. 6, 63; the use of the words “in fee simple” and the omission of the word “heirs,” see sect. 51; an acknowledgment instead of the ordinary covenant for production and safe custody of title deeds (sect. 9); and as to the mortgage deeds the usual powers incident to estate or interest of mortgagee (sect. 19), and the effect of advance on joint account, &c. (sect. 61), are also implied. Statutory forms.

**58.**—(1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed. Covenants to bind heirs, &c.

The object of this sub-section appears to be to render it unnecessary in future to insert the words “heirs and assigns” after the covenantee’s name in covenants relating Covenants to bind heirs, &c.

**Note to** land of inheritance or devolving on the heir as special  
**S.58,ss.1.** occupant.

It must be taken to mean covenants for the benefit of the owners of such land, for otherwise the words "heirs and assigns" would be inappropriate; besides, whether named or not, assigns not having notice of a restrictive covenant would not be bound at law unless the covenant ran with the land, which can only happen in the case of a lease in which the word "heirs" is inappropriate.

In equity the assign having notice of a restrictive covenant is bound, whether named or not, and is not entitled to the benefit of a covenant merely by being named unless such was the original intention of the parties. *Master v. Hansard*, 4 Ch. D. 718; Pollock on Contracts, 2nd Edit. 218; Dav. Conv., 4th Edit. vol. I. p. 137.

With the expression "devolving on the heir as special occupant," compare the expression "limited to the heir as special occupant" in sect. 30.

(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

The second sub-section deals with covenants relating to land not of inheritance, and supplies the words "executors, administrators, and assigns" in such covenants.

The words "executors and administrators" are quite superfluous in all cases.

The presence or absence of the word "assigns" in a covenant by a lessee has apparently but one important effect, namely, that where something is to be newly made on the premises the assigns are not bound unless named. See Pollock on Contracts, 2nd Edit. 218; and also see *Taite v. Gosling*, 11 Ch. D. 273.

(3.) This section applies only to covenants made after the commencement of this Act. Sect. 58.

The section only applies to covenants made after 31st December, 1881. This, probably, includes implied covenants, although some of them are specially provided for. See sect. 7, sub-sect. (6.)

**59.**—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed. Covenants to extend to heirs, &c.

The difference as regards creditors' remedies under a specialty where the heir is named, and a specialty where he is not named is that in the first case the creditor may, by 11 Geo. 4 & 1 Will. 4, c. 47, recover against the devisee or heir of the covenantor to the amount of the lands devised or descended as if the debt were to that amount the debt of the devisee or heir. The debt is the personal debt of the devisee or heir and not a charge on the land, which cannot be followed into the hands of a purchaser. Difference between specialty where heir is named and specialty where heir is not named.

The same statute enacts that creditors by specialty in which the heirs are bound, shall have priority over creditors by specialty in which the heirs are not bound in the administration of the estate of a trader who shall have died seised of or entitled to real estate.

The same thing is enacted by 3 & 4 Will. 4, c. 104.

This distinction seems to be abolished by 32 & 33 Vict. c. 46, which enacts that in the administration of the estate of any person who shall die after 1st January, 1870, all the creditors shall be treated as standing in equal degree.

**Note to S.59.ss.1.** In covenants made or implied after the commencement of this Act the heir will be bound, unless he is expressed not to be bound.

The difference is removed by this section.

It appears to be doubtful in cases where a covenant is intended to run with land the vendor retains whether he should not still be made to covenant for his assigns. See *Dav. Conv.* II. 4th Edit., p. 429, note *b.* ; *Taite v. Gosling*, 11 Ch. D. 273.

(2.) This section extends to a covenant implied by virtue of this Act.

For covenants implied by this Act, see sect. 7 sub-sect. (1) ; sect. 26 sub-sect. (1) ; and sect. 27, sub-sect. (3.)

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

If it should be desirable for any reason (it is difficult to imagine one) to bar the operation of this section, it may be done by expressing an intention to that effect. The section is not retrospective.

Effect of covenant with two or more jointly.

**60.—(1.)** A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of,

the survivor or survivors of them, and to, or for Sect. 60.  
the benefit of, any other person to whom the  
right to sue on the covenant, contract, bond, or  
obligation devolves.

This section enables the draftsman, by stating that the Effect of  
covenant is joint, to omit the repeated mention of the covenant  
“survivors or survivor” of the covenantees, while the with two  
appropriate representative of the last survivor will be or more  
supplied by sect. 58, when the covenant relates to land jointly.

The section does not alter the law as to the construction  
of the covenant, and a covenant joint in form may  
still be construed as several (see *Dev. Conv.*, 4th Edit.,  
vol. I. p. 113), except in the case provided for in the next  
section.

The abbreviation given in this section may be used in  
a power of sale by putting it in the form of a covenant.

(2.) This section extends to a covenant implied  
by virtue of this Act.

This section applies to implied covenants; in the cases  
referred to in the note to sect. 59, sub-sect (2), the effect of  
this section will have to be considered.

(3.) This section applies only if and as far as a  
contrary intention is not expressed in the cove-  
nant, contract, bond, or obligation, and shall  
have effect subject to the covenant, contract,  
bond, or obligation, and to the provisions therein  
contained.

(4.) This section applies only to a covenant,  
contract, bond, or obligation made or implied  
after the commencement of this Act.

Sub-sect. (3) enables the operation of the section to  
be barred, and sub-sect. (4) confines it to deeds made  
after 31st December, 1881.

**Sect. 61.**

Effect of  
advance  
on joint  
account,  
&c.

**61.**—(1.) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

Advance  
on joint  
account,  
&c.

This section provides that where money advanced on mortgage is expressed to belong to the mortgagees on a joint account, or where the mortgage, &c., is made to two jointly, the debt shall, as between mortgagees and mortgagor, be a joint debt.

Hitherto the money did not in equity belong to the mortgagees jointly unless it was expressly stated to do so, and as the declaration was generally not executed by the mortgagees, the joint account clause was of doubtful value. See *Fisher on Mortgages*, 3rd Edit. s. 1286.

This section reverses the equitable presumption as to the ownership of the mortgage money, and enables the



survivor or his representative to give a discharge for the money notwithstanding notice that the joint account is severed in fact. Note to S.61, ss.1.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

The operation of the section may be barred by a declaration to that effect, but such a declaration is not necessary if the mortgage, &c., is not made to several persons jointly and contains no joint account clause.

(3.) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this Act.

The section applies apparently to the case of a mortgage existing before and transferred after 31st December, 1881.

**62.—**(1.) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly. Grants of easements, &c., by way of use.

**Sect. 62.** (2.) This section applies only to conveyances made after the commencement of this Act.

This section enables the owner of freehold land to convey an easement, right, liberty, or privilege in or over the land just as if it were an estate in the land.

**Easement in gross, granted by way of use, will be assignable.** The easement thus created, though not annexed to a dominant tenement, will be assignable by the grantee, which hitherto has not been the case as respects easements in gross. See Gale on Easements, 5th Edit. p. 13.

**Provision for all the estate, &c.**

**63.—(1.)** Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

(2.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(3.) This section applies only to conveyances made after the commencement of this Act.

**“All the estate” clause.**

This section provides distinct authority for hereafter omitting the sonorous superfluity known as “all the estate” clause.

This has already been done in practice to some extent. See Davidson's Concise Precedents, 9th Edit pp. 7 and 69; but see Dart's V. & P., 5th Edit. 542.

**The construction of the**

The section introduces a real change in the law with respect to the construction of conveyances made after 31st.

December, 1881. What is included in the term "conveyance," see sect. 2 (v.). Note to Sect. 63.

In the case of *Francis v. Minton*, L. R. 2 C. P. 543, it was held that where the mortgagor professed to convey the fee and "all the estate, right, title, interest, property, possibility, claim, and demand," but had in fact only a leasehold interest as to one undivided moiety, the leasehold interest did not pass, the clause being controlled by a recital. implied estate clause.

In another case there cited this clause was held not to include property not specifically referred to, and see *Neame v. Moorsom*, L. R. 3 Eq. 91.

The section enacts not merely that the clause shall be implied, but that the deed shall be effectual, subject to a contrary intention expressed in the conveyance.

It is probable that mere omission will not control the implied clause.

**64.**—In the construction of a covenant or proviso, or other provision, implied in a deed by virtue of this Act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require. Construction of implied covenants.

This section re-enacts part of 13 & 14 Vict. c. 21, s. 4, which provides this rule of construction for Acts of Parliament. The section is merely declaratory.

It does not seem really necessary, since the words implied in a deed by virtue of the Act must have the same meaning as the expression in the Act.

### XIII.—LONG TERMS.

**65.**—(1.) Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three Enlargement of residue of long term

Sect. 65. hundred years, is subsisting in land, whether  
 into fee being the whole land originally comprised in the  
 simple. term, or part only thereof, without any trust  
 or right of redemption affecting the term in  
 favour of the freeholder, or other person entitled  
 in reversion expectant on the term, and without  
 any rent, or with merely a peppercorn rent or  
 other rent having no money value, incident to  
 the reversion, or having had a rent, not being  
 merely a peppercorn rent or other rent having  
 no money value, originally so incident, which  
 subsequently has been released, or has become  
 barred by lapse of time, or has in any other way  
 ceased to be payable, then the term may be  
 enlarged into a fee simple in the manner, and  
 subject to the restrictions, in this section pro-  
 vided.

Enlarge-  
 ment of  
 residue of  
 long term  
 into fee  
 simple.

A term may be converted into a fee simple by a declara-  
 tion to that effect in a deed, subject to the following con-  
 ditions :—

1. The original term must be not less than three hundred years.
2. There must be two hundred years of the term un-  
 expired.
3. There must be no trust or right of redemption in  
 favour of the freeholder or other person entitled in rever-  
 sion expectant on the term.
4. There must be no rent payable incident to the re-  
 version.

The third condition excludes terms held by a mortgagee,  
 whether as assignee or sub-lessee, unless the right of  
 redemption has become barred.

Terms in settlements seem generally to come within the  
 section where the trustees have sold the term out and out,  
 but not till then.

The words "other person entitled in reversion expectant

on the term" probably include mesne tenants ; and see Note to S.65, ss.1  
8 & 9 Vict. c. 106, s. 9.

The fourth condition seems to exclude all cases of lease by deed at a rent, for the rent, it is said, cannot be barred by non-payment so long as the relation of landlord and tenant exists (Shelford, 8th Edit., 146 ; *Archbold v. Scully*, 9 H. L. C. 360) ; and the case of land held adversely to the reversioner is excluded by the word "subsisting."

Where there is a rent not originally incident to the reversion, as where the lessee has assigned the lease reserving a rent, the section will apply.

(2.) Each of the following persons (namely) :

(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term ; but in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence ;

(ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not ;

(iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not ;

shall, as far as regards the land to which he is entitled, or in which he is interested, in right of

Sect. 65. the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple.

Persons  
entitled to  
exercise  
the power.

The persons who may enlarge the term into a fee are :—

1. A legal owner or a *cestui que trust* who is entitled to the whole of the profits, unless it appears from the instrument under which he claims that he is not intended to have possession, or a married woman entitled to the profits for her separate use. In the latter case her husband must concur, unless she is entitled to the *corpus* for her separate use. Lewin on Trusts, 6th Edit. 558.

2. The trustee, if the *cestui que trust* is not entitled to the possession.

3. An executor or administrator, whether there be a *cestui que trust* entitled to the possession or not.

(3.) Thereupon, by virtue of the deed and of this Act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

(4.) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

The term is to become a fee simple, vested in the person in whom the term was vested, but subject to rights enumerated in such sweeping terms that it seems doubtful

whether the enlargement can have any practical effect, except in the case provided for in the following sub-section. Note to  
S.65 ss.4.

(5.) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be, and shall be, conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

Sub-sect. (5) deals with the case of leaseholds settled by reference to trusts of freeholds.

This may give a tenant for life, when the leaseholds have not become indefeasibly vested, the power of altering the devolution of the leaseholds to some extent, and also provides a means of disentailing the leaseholds.

(6.) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in



Sect. 65. right, or in fact, or have not been severed or reserved by an inclosure Act or award.

(7.) This section applies to every such term as aforesaid subsisting at or after the commencement of this Act.

This sub-section gives the lessee a title to the mines and minerals in the lands which have not been severed in right or in fact.

In cases where there are minerals, which might be worked by instroke from adjoining land, the enlargement of the term may make a serious difference to the reversioner if the minerals have not been expressly reserved, or already began to be worked, which is the presumed meaning of the phrase "severed in right or in fact."

Stamp.

A deed converting a long term into a fee simple, under this section, not being one of the deeds expressly mentioned in the schedule to the Stamp Act, 1870 (33 & 34 Vict. c. 97), will, it is assumed, be liable to a 10s. stamp duty.

#### XIV.—ADOPTION OF ACT.

Protection of solicitor and trustees adopting Act.

**66.**—(1.) It is hereby declared that the powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be contained in any such instrument, or to be adopted in connexion with, or applied to, any such contract or transaction; and a solicitor shall not be deemed

guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any such instrument, or in connexion with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this Act would allow of his doing so. Sect. 66.

(2.) But nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connexion with, or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.

(3.) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

(4.) Where such persons are acting without a solicitor, they shall also be protected in like manner.

As to proper or usual powers in executory trusts, see Lewin on Trusts, 6th Edit. 112.

So long as a solicitor acts in good faith, he shall not be deemed negligent for omitting to modify the provisions of the Act.

If he does modify the powers, &c., given by the Act, he is left under his present liability.

Trustees, executors, &c., whether employing a solicitor or not, enjoy a similar immunity.

## Sect. 67.

## XV.—MISCELLANEOUS.

Regulations re-  
specting  
notice.

Notice in  
writing.

**67.**—(1.) Any notice required or authorized by this Act to be served shall be in writing.

The notice required by this section shall be in writing, or (sect. 2 (xvi.)) in print, or partly in writing and partly in print.

(2.) Any notice required or authorized by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

These notices are : Notice of a breach of covenant in a lease, sect. 14, sub-sect. (1), and notice requiring payment of the mortgage money, sect. 20, sub-sect. (1).

(3.) Any notice required or authorized by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

The only notice to a person other than a lessee or mortgagor

to which this section applies, is the notice of redemption of a rent-charge in sect. 41, sub-sect. (2). Note to  
S.67,ss.3.

(4.) Any notice required or authorized by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the afore-said place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

The letter must be addressed to the person to be served by name; if there is any uncertainty as to the name, the notice must be served as prescribed by sub-sects. (3) and (4).

(5.) This section does not apply to notices served in proceedings in the Court.

The notices mentioned in this Act to which this section does not apply, are mentioned in sect. 5, sub-sect. (3); and see sect. 69, sub-sects. (4), (5), and (6).

**68.**—The Act described in Part II. of the First Schedule to this Act shall, by virtue of this Act, have the short title of the Statutory Declarations Act, 1835, and may be cited by that short title in any declaration made for any purpose under or by virtue of that Act, or in any other document, or in any Act of Parliament. Short  
title of 5 &  
6 Will. 4,  
c. 62.

The full title contains sixty-four words. The mention of the Act in a draft, according to the present scale of remuneration, at the rate of a shilling a folio, costs about tenpence halfpenny.

## XVI.—COURT ; PROCEDURE ; ORDERS.

Sect. 69.

Regulations respecting payments into Court and applications.

**69.**—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

There is nothing in the Judicature Acts and rules limiting this section.

(2.) Payment of money into Court shall effectually exonerate therefrom the person making the payment.

Payment into Court.

Except under the Trustee Acts and sect. 25 of the Judicature Act, 1873, payment into Court only operates as a discharge in certain cases. See *Matthew v. Northern Assurance Co.*, 9 Ch. D. 80 ; *Re Sutton's Trusts*, 12 Ch. D. 175.

Probably this sub-section is intended to apply only to payments into Court made under this Act—*e.g.*, in discharge of incumbrances on a sale. Sect. 5 ; sect. 21, sub-sect. (3).

Even if it is held to apply to all payments into Court the discretion of the Court as to costs (sub-sect. (7), *post*), may prevent the sub-section from making much practical alteration in the law. But see note to sect. 70.

(3.) Every application to the Court shall, except where it is otherwise expressed, be by summons at Chambers.

This does not apply to proceedings under sect. 41, which are governed by the rules made under the Settled Estates Act, 1877.

A judge in Chambers has, under sect. 39 of the Judicature Act, 1873, all the jurisdiction of the High Court of Justice. See *Clover v. Adams*, 6 Q. B. D. 622.

County Courts.

It will be noticed that the county courts have no jurisdiction with regard to matters under the Act.

(4.) On an application by a purchaser notice Sect. 69. shall be served in the first instance on the vendor.

(5.) On an application by a vendor notice shall be served in the first instance on the purchaser.

(6.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

“Purchaser” has an extended meaning by sect. 2 (viii.), “Purchaser.” but it is here restricted to its primary meaning by the word vendor.

The cases referred to are those which arise under sect. 5.

The modes of service are prescribed by sect. 67.

(7.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

This gives the Court an absolute discretion, as to costs, wider than that given by Order LV. of the Rules of Court, 1875.

(8.) General rules for purposes of this Act shall be deemed rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, and may be made accordingly. <sup>39 & 40  
Vict. c. 59  
s. 17.</sup>

(9.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and rules for regulating proceedings in that Court shall be from time to time

**Sect. 69.** made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

(10.) General rules, and rules of the Court of Chancery of the County Palatine, under this Act may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

Orders of  
Court  
conclusive.

**70.**—(1.) An order of the Court under any statutory or other jurisdiction shall not as against a purchaser be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

Orders  
of Court  
conclusive.

This section is open to the verbal criticism that where an order is made “under any statutory or other jurisdiction” there can be no want of jurisdiction.

The words of the section seem to give the purchaser a good title where there has been an order that the land shall be sold.

If so, the purchaser need not enquire into the title, and may be held to his bargain in cases where at present specific performance might be refused as against him on the ground that the order might be invalidated. See *Num v. Hancock*, L. R. 6 Ch. 850; *Re Banister*, 12 Ch. D. 131.

The purchaser by paying the purchase money into Court would, by sect. 69, sub-sect. (2), be discharged.

Purchaser here seems to include mortgagee and lessee, and to extend to a purchaser who has not got the legal estate.

(2.) This section shall have effect with respect to any lease, sale, or other act under the authority



of the Court, and purporting to be in pursuance Sect. 70. of the Settled Estates Act, 1877, notwithstanding <sup>40 & 41</sup> the exception in section forty of that Act, or to be <sup>Vict. c. 18, s. 40.</sup> in pursuance of any former Act repealed by that Act, notwithstanding any exception in such former Act.

Sect. 40 of the Settled Estates Act provides that an Act under the authority of the Court, and purporting to be in pursuance of that Act, shall not be invalidated except as against some person whose concurrence ought to have been obtained, or who ought to have had notice, but has not; and see *Beioley v. Carter*, L. R. 4 Ch. 230; *Re Shephard's Settled Estates*, L. R. 8 Eq. 571.

(3.) This section applies to all orders made before or after the commencement of this Act, except any order which has before the commencement of this Act been set aside or determined to be invalid on any ground, and except any order as regards which an action or proceeding is at the commencement of this Act pending for having it set aside or determined to be invalid.

This section is retrospective, but does not apply where the order has been attached before the commencement of the Act.

## XVII.—REPEALS.

**71.**—(1.) The enactments described in Part III. of the Second Schedule to this Act are hereby repealed. Repeal of enactments in Part III. of Second Schedule; restriction on all repeals.

(2.) The repeal by this Act of any enactment shall not affect the validity or invalidity, or any operation, effect, or consequence of any instrument executed or made, or of anything done or

**Sect. 71.** suffered, before the commencement of this Act, or any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act; but this provision shall not be construed as qualifying the provision of this Act relating to section forty of the Settled Estates Act, 1877, or any former Act repealed by that Act.

Repeal of enactments.

This section, which repeals sects. 11 to 30 of Lord Cranworth's Act, provides that the repeal shall not affect the operation, effect, or consequence of any instrument executed or made before 31st December, 1881, so that where Lord Cranworth's Act has been relied on this Act will not alter the effect of a deed or will already made.

For the provision of this Act relating to sect. 40 of the Settled Estates Act, 1877, see *ante*, sect. 70.

## XVIII.—IRELAND.

Modifications respecting Ireland.

**72.—(1.)** In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but general rules under this Act may direct that any of those matters be assigned to the land judges of that division.

(4.) The proper office of the Supreme Court of Judicature in Ireland shall be substituted for the central office of the Supreme Court of Judicature.

(5.) General rules for purposes of this Act for Sect. 72. Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, <sup>40 & 41</sup> and may be made accordingly, at any time after <sup>Vict. c. 57,</sup> the passing of this Act, to take effect on or after <sup>s. 69.</sup> the commencement of this Act.

It may be noticed that sects. 25 and 45 are the only sections in the Act that do not extend to Ireland.

**73.**—(1.) Section five of the Vendor and Purchaser Act, 1874, is hereby repealed from and after the commencement of this Act, as regards cases of death thereafter happening; and section seven of the Vendor and Purchaser Act, 1874, is hereby repealed as from the date at which it came into operation. <sup>Death of bare trustee intestate, &c. 37 & 38 Vict. c. 78.</sup>

(2.) This section extends to Ireland only.

Sect. 5 of the Vendor and Purchaser Act, 1874, had been already repealed as to England by sect. 48 of the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), except as to anything duly done thereunder before the 1st January, 1876. Sect. 48 of the Land Transfer Act is repealed by *ante*, sect. 30, sub-sect. (3), as to cases of death after 31st December, 1881.

## SCHEDULES.

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### THE FIRST SCHEDULE (*a*).

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#### ACTS AFFECTED.

##### PART I.

- Sched. 1 & 2 Vict. c. 110.—An Act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England.
- 2 & 3 Vict. c. 11.—An Act for the better protection of purchasers against judgments, Crown debts, *lis pendens*, and fiats in bankruptcy.
- 18 & 19 Vict. c. 15.—An Act for the better protection of purchasers against judgments, Crown debts, cases of *lis pendens*, and life annuities or rentcharges.
- 22 & 23 Vict. c. 35.—An Act to further amend the law of property and to relieve trustees.
- 23 & 24 Vict. c. 38.—An Act to further amend the law of property.
- 23 & 24 Vict. c. 115.—An Act to simplify and amend the practice as to the entry of satisfaction on Crown debts and on judgments.

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(*a*) This schedule was referred to in sect. 5 of the Act as originally drawn; it does not seem to be connected with the Act as it now stands.

It is quite possible that, for instance, in case of a sale by a mortgagee under sect. 21 questions might arise as to the effect of these Acts in connection with this Act; but it is difficult to see how this schedule could help to indicate an answer.

- 27 & 28 Vict. c. 112.—An Act to amend the law relating to future judgments, statutes, and recognizances. Sched.
- 28 & 29 Vict. c. 104.—The Crown Suits, &c., Act, 1865.
- 31 & 32 Vict. c. 54.—The Judgments Extension Act, 1868.

## PART II.

5 & 6 Will. 4, c. 62.—An Act to repeal an Act of the present session of parliament, intituled “An Act for the more effectual abolition of oaths and affirmations taken and made in various departments of the state, and to substitute declarations in lieu thereof; and for the more entire suppression of voluntary and extra-judicial oaths and affidavits;” and to make other provisions for the abolition of unnecessary oaths.

## THE SECOND SCHEDULE.

## REPEALS.

A description or citation of a portion of an Act is inclusive of the words, section, or other part, first or last mentioned, or otherwise referred to as forming the beginning, or as forming the end, of the portion comprised in the description or citation.

## PART I.

22 & 23 Vict. c. 35 - in part.	An Act to further amend the law of property and to re- lieve trustees - Sections four to nine.	} in part; namely,—
23 & 24 Vict. c. 126 - in part.	The Common Law Pro- cedure Act, 1860 - Section two.	} in part; namely,—

## Sched.

## PART II.

15 & 16 Vict.	An Act to amend the	} in part; namely,—
c. 86 - -	practice and course	
in part.	of proceeding in the High Court of Chan- cery.	
	Section forty-eight.	

## PART III.

8 & 9 Vict.	An Act to facilitate the	
c. 119 -	conveyance of real property.	
23 & 24 Vict.	An Act to give to	} in part; namely,—
c. 145 -	trustees, mortgagees,	
in part.	and others certain	
	powers now com- monly inserted in settlements, mort- gages, and wills -	
	Parts II. and III (sections eleven to thirty)	

## THE THIRD SCHEDULE.

## STATUTORY MORTGAGE.

## PART I.

*Deed of Statutory Mortgage.*

This INDENTURE made by way of statutory mortgage  
the            day of            1882 between A. of [ &c. ] of the  
one part and M. of [ &c. ] of the other part WITNESSETH  
that in consideration of the sum of £            now paid to  
A. by M. of which sum A. hereby acknowledges the receipt  
A. as mortgagor and as beneficial owner hereby conveys to  
M. All that [ &c. ] To hold to and to the use of M. in fee

simple for securing payment on the                      day of  
 1883 of the principal sum of £                      as the mortgage  
 money with interest thereon at the rate of [four] per  
 centum per annum.

Sched.  
 —

In witness, &c.

\* \* \* *Variations in this and subsequent forms to be made, if  
 required, for leasehold land, or other matter.*

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## PART II.

### (A.)

#### *Deed of Statutory Transfer, Mortgagor not joining.*

THIS INDENTURE made by way of statutory transfer  
 mortgage the                      day of                      1883 between *M.* of  
 [§c.] of the one part and *T.* of [&c.] of the other part sup-  
 plemental to an indenture made by way of statutory mort-  
 gage dated the                      day of                      1882 and made  
 between [&c.] WITNESSETH that in consideration of the  
 sum of £                      now paid to *M.* by *T.* being the aggregate  
 amount of £                      mortgage money and £                       
 interest due in respect of the said mortgage of which sum  
*M.* hereby acknowledges the receipt *M.* as mortgagee  
 hereby conveys and transfers to *T.* the benefit of the said  
 mortgage.

In witness, &c.

### (B.)

#### *Deed of Statutory Transfer, a Covenantor joining.*

THIS INDENTURE made by way of statutory transfer of  
 mortgage the                      day of                      1883 between *A.* of  
 [§c.] of the first part *B.* of [&c.] of the second part and *C.*  
 of [&c.] of the third part supplemental to an indenture  
 made by way of statutory mortgage dated the                      day  
 of                      1882 and made between [&c.] WITNESSETH  
 that in consideration of the sum of £                      now paid to



Sched. — *A.* by *C.* being the mortgage money due in respect of the said mortgage no interest being now due and payable thereon of which sum *A.* hereby acknowledges the receipt *A.* as mortgagee with the concurrence of *B.* who joins herein as covenantor hereby conveys and transfers to *C.* the benefit of the said mortgage.

In witness, &c.

(C.)

*Statutory Transfer and Statutory Mortgage combined.*

THIS INDENTURE made by way of statutory transfer of mortgage and statutory mortgage the            day of 1883 between *A.* of [§c.] of the first part *B.* of [§c.] of the second part and *C.* of [§c.] of the third part supplemental to an indenture made by way of statutory mortgage dated the            day of 1882 and made between [§c.] WHEREAS the principal sum of £            only remains due in respect of the said mortgage as the mortgage money and no interest is now due and payable thereon AND WHEREAS *B.* is seised in fee simple of the land comprised in the said mortgage subject to that mortgage NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £            now paid to *A.* by *C.* of which sum *A.* hereby acknowledges the receipt and *B.* hereby acknowledges the payment and receipt as aforesaid\* *A.* as mortgagee hereby conveys and transfers to *C.* the benefit of the said mortgage AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as mortgagee and according to his estate and by direction of *B.* hereby conveys and *B.* as beneficial owner hereby conveys and confirms to *C.* All that [§c.] To hold to and to the use of *C.* in fee simple for securing payment on the            day of 1882 of† the sum of £            as the mortgage money with interest thereon at the rate of [four] per centum per annum.

In witness, &c.

[Or, in case of further advance, after aforesaid at \* insert and also in consideration of the further sum of £

now paid by *C.* to *B.* of which sum *B.* hereby acknowledges the receipt, and after of at † insert the sums of £  
and £ making together] Sched.  
—

\* \* \* *Variations to be made, as required, in case of the deed being made by indorsement, or in respect of any other thing.*

### PART III.

#### *Deed of Statutory Re-conveyance of Mortgage.*

This INDENTURE made by way of statutory re-conveyance of mortgage the                      day of                      1884 between *C.* of [§c.] of the one part and *B.* of [§c.] of the other part supplemental to an indenture made by way of statutory transfer of mortgage dated the                      day of 1883 and made between [§c.] WITNESSETH that in consideration of all principal money and interest due under that indenture having been paid of which principal and interest *C.* hereby acknowledges the receipt *C.* as mortgagee hereby conveys to *B.* all the lands and hereditaments now vested in *C.* under the said indenture To hold to and to the use of *B.* in fee simple discharged from all principal money and interest secured by and from all claims and demands under the said indenture.

In witness, &c.

\* \* \* *Variations as noted above.*

## THE FOURTH SCHEDULE.

### SHORT FORMS OF DEEDS.

#### I.—*Mortgage.*

This INDENTURE OF MORTGAGE made the                      day of                      1882 between *A.* of [&c.] of the one part and *B.* of [§c.] and *C.* of [§c.] of the other part WITNESSETH that

Sched. — in consideration of the sum of £                      paid to A. by B. and C. out of money belonging to them on a joint account of which sum A. hereby acknowledges the receipt A. hereby covenants with B. and C. to pay to them on the                      day of                      1882 the sum of £                      with interest thereon in the meantime at the rate of [four] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to B. and C. interest thereon at the same rate by equal half-yearly payments on the                      day of                      and the                      day of                      AND THIS INDENTURE ALSO WITNESSETH that for the same consideration A. as beneficial owner hereby conveys to B. and C. All that [§c.] To hold to and to the use of B. and C. in fee simple subject to the proviso for redemption following (namely) that if A. or any person claiming under him shall on the                      day of                      1882 pay to B. and C. the sum of £                      and interest thereon at the rate aforesaid then B. and C. or the persons claiming under them will at the request and cost of A. or the persons claiming under him re-convey the premises to A. or the persons claiming under him And A. hereby covenants with B. as follows [*here add covenant as to fire insurance or other special covenant required*].

In witness, &c.

## II.—Further Charge.

This INDENTURE made the                      day of                      18                      between [*the same parties as the foregoing mortgage*] and supplemental to an indenture of mortgage dated the                      day of                      18                      and made between the same parties for securing the sum of £                      and interest at [four] per centum per annum on property at [§c.] WITNESSETH that in consideration of the further sum of £                      paid to A. by B. and C. out of money belonging to them on a joint account [*add receipt and covenant as in the foregoing mortgage*] and further that all the property comprised in the before-mentioned indenture of mortgage shall stand charged with the payment to B. and C. of the sum of £                      and the interest thereon hereinbefore covenanted to be paid as well

as the sum of £                      and interest secured by the same      Sched.  
indenture.

In witness, &c.

### III.—*Conveyance on Sale.*

This INDENTURE made the                      day of                      1883  
between *A.* of [§c.] of the first part *B.* of [§c.] and *C.* of  
[§c.] of the second part and *M.* of [§c.] of the third part  
WHEREAS by an indenture dated [§c.] and made between  
[§c.] the lands hereinafter mentioned were conveyed by  
*A.* to *B.* and *C.* in fee simple by way of mortgage for secur-  
ing £                      and interest and by a supplemental inden-  
ture dated [§c.] and made between the same parties those  
lands were charged by *A.* with the payment to *B.* and *C.* of  
the further sum of £                      and interest thereon And  
WHEREAS a principal sum of £                      remains due under  
the two before-mentioned indentures, but all interest  
thereon has been paid as *B.* and *C.* hereby acknowledge  
NOW THIS INDENTURE WITNESSETH that in consideration of  
the sum of £                      paid by the direction of *A.* to *B.* and  
*C.* and of the sum of £                      paid to *A.* those two sums  
making together the total sum of £                      paid by *M.* for  
the purchase of the fee simple of the lands hereinafter men-  
tioned of which sum of £                      *B.* and *C.* hereby acknow-  
ledge the receipt and of which total sum of £                      *A.*  
hereby acknowledges the payment and receipt in manner  
before-mentioned *B.* and *C.* as mortgagees and by the  
direction of *A.* as beneficial owner hereby convey and *A.* as  
beneficial owner hereby conveys and confirms to *M.* All  
that [§c.] To hold to and to the use of *M.* in fee simple  
discharged from all money secured by and from all claims  
under the before-mentioned indentures [*Add, if required,*  
And *A.* hereby acknowledges the right of *M.* to production  
of the documents of title mentioned in the schedule hereto  
and to delivery of copies thereof and hereby undertakes for  
the safe custody thereof].

In witness, &c.

[The Schedule above referred to.

*To contain list of documents retained by A.]*

## Sched.

## IV.—Marriage Settlement.

This INDENTURE made the                      day of                      1882  
between *John M.* of [*&c.*] of the first part *Jane S.* of [*&c.*]  
of the second part and *X.* of [*&c.*] and *Y.* of [*&c.*] of the  
third part WITNESSETH that in consideration of the  
intended marriage between *John M.* and *Jane S.* *John M.*  
as settlor hereby conveys to *X.* and *Y.* All that [*&c.*] To  
hold to *X.* and *Y.* in fee simple to the use of *John M.* in  
fee simple until the marriage and after the marriage to the  
use of *John M.* during his life without impeachment of  
waste with remainder after his death to the use that *Jane S.*  
if she survives him may receive during the rest of her life  
a yearly jointure rentcharge of £                      to commence  
from his death and to be paid by equal half-yearly pay-  
ments the first thereof to be made at the end of six calendar  
months from his death if she is then living or if not a pro-  
portional part to be paid at her death and subject to the  
before-mentioned rentcharge to the use of *X.* and *Y.* for a  
term of five hundred years without impeachment of waste  
on the trusts hereinafter declared and subject thereto to the  
use of the first and other sons of *John M.* and *Jane S.* suc-  
cessively according to seniority in tail male with remainder  
[insert here, if thought desirable, to the use of the same first  
and other sons successively according to seniority in tail  
with remainder] to the use of all the daughters of *John M.*  
and *Jane S.* in equal shares as tenants in common in tail  
with cross remainders between them in tail with remainder  
to the use of *John M.* in fee simple. [Insert trusts of  
term of 500 years for raising portions; also, if required, power  
to charge jointure and portions on a future marriage; also  
powers of sale, exchange, and partition, and other powers and  
provisions, if and as desired.]

In witness, &c.

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# PRECEDENTS.

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No. 1.

Forms.

## *General Conditions of Sale of Property in Lots.*

1. The highest bidder shall be the purchaser, and if any dispute arise concerning the highest bidding, the property shall be put up again at a former bidding to be named by the auctioneer.

2. No person shall advance at any bidding less than £ [or the sum which shall be fixed by the auctioneer at the time of the sale] and no bidding shall be retracted.

3. Each lot is sold (*a*) subject to a reserved price, and the vendor reserves the right of bidding for each lot, of making any addition to or alteration in the particulars or conditions prior to or at the time of sale, of withdrawing any lot or any part thereof from the sale, of altering the sequence of lots, and of combining two or more lots in one.

4. The purchaser shall immediately after the sale pay to the auctioneer [or to the vendor's solicitor] a deposit of £ per cent. upon the amount of his purchase money and sign an agreement to complete the purchase according to these conditions.

5. The fixtures and all timber and timberlike trees, tellers, pollards, saplings, and underwood upon every lot down to the value of 1s. per stick shall be paid for by the

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(*a*) See 30 & 31 Vict. c. 48, ss. 5, 6.

Forms. purchasers at a valuation to be made by two [valuers, one to be appointed by the vendor and the other by the purchaser, or by an umpire to be appointed by the valuers before they proceed to the valuation; and if either party shall refuse or neglect to appoint a valuer for the purposes aforesaid, or to notify it in writing to the other party for the space of (*fourteen*) days from the day of sale, or if the valuer appointed by either party shall refuse or neglect to act, then the valuation shall be made by the valuer (if duly notified as aforesaid) of the other party alone, and his valuation shall be final and binding on both parties. If such valuation shall not be made as aforesaid, then the said fixtures, trees, tellers, pollards, saplings, and underwood shall be paid for by the purchaser at their fair value] (*or valuers or their umpire appointed in the usual way or otherwise*).

6. The balance of the purchase money (including the amount of the aforesaid valuation) of each lot shall be paid and the purchase thereof shall be completed on the day of            next at the office of           , the vendor's solicitors. If from any cause whatsoever the purchase of any lot shall not be completed on the said            of            the purchaser thereof shall pay to the vendor interest at the rate of five per cent. per annum on the remainder of his purchase money (including the amount of the valuation aforesaid) from that day until the completion of the purchase.

7. An (*a*) abstract of title to the property purchased shall be delivered by the vendor to each purchaser within            days from the day of the sale.

8. The title (*b*) shall commence as to lots, &c., with an indenture dated, &c., and as to lots, &c., with the admission of            on the            day of           .

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(*a*) A purchaser of more lots than one is only entitled to one abstract of the common title, except at his own expense. See sect. 3, sub-sect. 7, *ante*, p. 11.

(*b*) Sect. 3, sub-sect. 3, *ante*, p. 8.



Forms.

9. The purchaser shall send his objections and requisitions in respect of the title and of all matters appearing on the abstract, particulars, or conditions to the vendor's solicitors within                      days from the delivery of the abstract (and in this respect time shall be of the essence of the contract); and in default of such objections and requisitions (if none), and subject only to such (if any) the purchaser shall be deemed to have accepted the title; and if he shall make and insist on any requisition or objection which the vendor shall be unable to remove or comply with (of which inability (c) a statutory declaration by the vendor's solicitor of his belief to that effect shall be deemed conclusive evidence, or the removal of or compliance with which objection or requisition will in the opinion of the vendor's counsel be probably attended with great or unnecessary expense), the vendor may by notice in writing to be given to the purchaser within                      days from the date of the delivery of such requisition or objection rescind the sale and shall thereupon return to the purchaser his deposit, without any interest, costs, or compensation whatsoever, but the purchaser may within fourteen days after receiving the notice to rescind withdraw the objection or requisition, in which case the notice to rescind shall be deemed to be withdrawn also (d).

10. The purchaser shall admit the identity of the property purchased by him with that described in the abstract (but the vendor is prepared at the request and cost of the purchaser to provide a statutory declaration that the property has been enjoyed according to the title for                      years).

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(c) That such a condition is not needlessly depreciatory, see *Falkner v. Equitable Reversionary Interest Co.* 7 W. R. 73; and *Warde v. Dickson*, 7 W. R. 148.

(d) For the condition as to recitals in deeds being evidence, see Vendor and Purchaser Act, 1874, sect. 2; and sect. 3, sub-sect. 3, *ante*, p. 8.

As to expenses of production of deeds, attested copies, &c., see sect. 3, sub-sect. 6, *ante*, p. 10.

**Forms.**

11. Any error or mis-statement in the particulars or in these conditions shall not annul the sale, but (a) compensation shall be made in respect thereof by the vendor or purchaser as the case may require, to be ascertained in the usual manner by arbitration.

12. The several lots are sold subject to the existing tenancies, all easements, quit rents, and other incidents of tenure (if any) affecting the same. And where two or more lots are included in one tenancy, the rent shall be apportioned between such lots as specified in the particulars, and the tenant shall not be required to concur in or consent to such apportionment.

13. The property shall from the day of sale be at the risk of the purchaser, but the purchaser shall be entitled to the (b) benefit of any insurance kept up by the vendor, and shall on completion of the purchase repay to the vendor the payments, or an apportioned part thereof (as the case may be), which shall have been made by the vendor in keeping up such insurance from the day of sale until completion of the purchase.

14. Each purchaser shall from the said                    day of                    be entitled to the possession or to the receipt of the rents and profits of the property purchased by him, and all outgoings up to that day shall be paid by the vendor, and all current rents and outgoings shall, if necessary, be (c) apportioned between the vendor and purchaser for the purposes of this condition.

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(a) See *In re Turner and Skelton*, 13 Ch. D. 130; *Allen v. Richardson*, 13 Ch. D. 524; *Brett v. Clowser*, 5 C. P. D. 376, 388.

(b) See *Rayner v. Preston*, 18 Ch. D. 1.

(c) Under the Apportionment Act, 1870 (33 & 34 Vict. c. 35), the rent of the property would be apportionable, but it may be prudent to make some condition as to outgoings. See *Hare v. Overseers of Putney*, 7 Q. B. D. 223.

Forms.

15. On payment of the balance of the purchase money (including the amount of the aforesaid valuation), the vendor shall make and execute a proper assurance of the property to the purchaser such assurance to be prepared by and at the expense of the purchaser, and to be left by him for execution at the office aforesaid, not less than            days before the said            day of            next, and if the purchaser is desirous of having the execution of the conveyance attested by some person appointed by him he shall leave a (d) notice in writing to that effect, at the office aforesaid, not less than            days before the said day of            next.

16. Such of the documents of title in the vendor's possession as relate to more than one lot shall be delivered to the (e) purchaser of the largest part in value of the lots to which the same relate, if all such lots shall be sold, and he shall give to the purchasers of the other lots to which the same relate an acknowledgment in writing of their right to production of the documents of title and to delivery of copies thereof, and also shall give to the purchasers aforesaid an undertaking in writing for safe custody thereof. If all the lots to which any documents relate are not sold, such documents shall be (f) retained by the vendor, and he shall give to the purchasers of such of the same lots as are sold the usual acknowledgment and undertaking of the right to production and delivery of copies thereof. Every acknowledgment and undertaking under this condition shall be prepared by and at the expense of the person entitled to request production, and shall be perused by

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(d) Unless the purchaser gives some notice he is not entitled to have the conveyance executed in his presence or in that of his solicitor. See sect. 8, *ante*, p. 29.

(e) In the absence of conditions the purchaser of the largest lot in value is entitled to the custody of the title deeds. *Dart's V. & P.* 144.

(f) Where a vendor retains part of the estate he is entitled to retain the title deeds. Vendor and Purchaser Act, 1874, sect. 2 (5) ; and see sect. 9, *ante*, p. 29.

**Forms.** or on behalf of the giver of the acknowledgment and undertaking at his own expense.

17. If the purchaser shall fail to comply with the above conditions the vendor may rescind the contract, and retain the deposit as liquidated damages, or he may resell the property either by public auction or by private contract, with or without notice to the purchaser and subject to such conditions as the vendor may think fit, and the deficiency, if any, on such resale, together with all expenses attending the same and all costs, losses, damages and expenses by reason of such default, shall be made good to the vendor by the defaulter, and in case of non-payment the same shall be recoverable by the vendor as liquidated damages.

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*Form of Agreement for Completion of the Purchase referred to in the above conditions.*

Memorandum of agreement made the                      day of  
    between *A.B.* of &c. the vendor of the one part  
 and *C.D.* of &c. the purchaser of the other part Whereby  
 it is witnessed that *C.D.* is the purchaser of the property  
 described as lot                      in the foregoing particulars at the  
 price of £                      subject to the above conditions of sale  
 (*a*) and *A.B.* and *C.D.* do on their respective parts agree  
 to complete the sale and purchase according to the said  
 conditions

As witness the hands of the parties.

Received the sum of £                      the deposit on the said  
 purchase

Dated the                      day of

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(*a*) In the case of a sale by private contract add [so far as the same are applicable to a sale by private contract].

No. 2.

*Conveyance of Freeholds to a Purchaser in Fee.*

This INDENTURE made the                      day of                      between A.B. of &c. [*vendor*] of the one part and C.D. of &c. [*purchaser*] of the other part. Whereas (a) A.B. is seised in unincumbered fee simple in possession of the (b) hereditaments hereinafter expressed to be hereby conveyed Now THIS INDENTURE WITNESSETH that in consideration of £                      now paid by C.D. to A.B. for the purchase of the fee simple of the hereditaments expressed to be hereby conveyed (of which sum A.B. hereby acknowledges the receipt) A.B. as beneficial owner hereby conveys to C.D. All &c. [*parcels*] (c) To hold unto and to the use of C.D. (d) in fee simple (e) (*add if required*); and A.B. hereby (f) acknowledges the right of C.D. to production of the documents of title mentioned in the schedule hereto and to delivery of copies thereof and hereby undertakes for the safe custody thereof.

In witness, &c.

THE SCHEDULE ABOVE REFERRED TO.

(a) This recital has been inserted in order to obtain prospectively the protection conferred by sect. 2 of the Vendor and Purchaser Act, 1874, which makes recitals in deeds twenty years old, sufficient evidence of the truth of the facts, and that the deed may then furnish a good commencement of title. (*Bolton v. London School Board*, 7 Ch. D. 766; *General Finance, &c. Co. v. Liberator Benefit, &c. Society*, 10 Ch. D. 15, and see sect. 3, sub-sect. 3, *ante*, p. 8.)

(b) A conveyance of land includes all buildings thereon and everything appurtenant thereto (sect. 6, and for the definition of *land* see sect. 2 (ii) ). The word *land* has an extended meaning when used in the Act, but its meaning is not apparently thereby extended when used in a conveyance.

(c) The general words are implied by sect. 6, and "all the estate" clause is implied by sect. 63.

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**Forms.** (d) After the 31st December, 1881, it will be sufficient to use the words "in fee simple" without the word "heirs" in the limitation of an estate in fee simple. Sect. 51.

(e) The declaration barring dower can be here inserted if required. Covenants for title by a vendor are implied by sect. 7.

(f) This takes the place of the covenants for production of title deeds inserted in documents prior to this Act, (sect. 9). Considering the object stated in note (a), it seems unwise, should the recital be used, to insert this list of documents in the deed itself, and thus furnish means of disproving the recital, and in this case it may be deemed advisable to have an acknowledgment independently of the conveyance.

### No. 3.

#### *Conveyance of Freeholds subject to a Lease for 99 Years.*

THIS INDENTURE made the                      day of  
between *A.B.* of &c. [*vendor*] of the one part and *C.D.* of  
&c. [*purchaser*] of the other part Whereas by an inden-  
ture dated the                      day of                      and made between  
[*parties*] *A.B.* demised the hereditaments hereinafter men-  
tioned to *E.F.* for the term of 99 years from the  
day of                      then last at the yearly rent of £  
and under and subject to the covenants and conditions  
therein contained NOW THIS INDENTURE WITNESSETH  
that in consideration of £                      paid to *A.B.* by  
*C.D.* for the purchase of the fee simple of the here-  
ditaments hereinafter mentioned (of which sum *A.B.*  
hereby acknowledges the receipt) *A.B.* as beneficial owner  
hereby conveys to *C.D.* All &c. [*parcels*] together  
with the full benefit of the rent covenants and other the  
benefits and advantages reserved by the said indenture  
of lease To hold subject to the said indenture of lease  
unto and to the use of *C.D.* in fee simple.

In witness, &c.

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No. 4.

*Conveyance of a Life Estate in Freeholds.*

THIS INDENTURE made the                      day of  
between *A.B.* of &c. [*vendor*] of the one part and *C.D.* of  
&c. [*purchaser*] of the other part Whereas by an inden-  
ture dated &c. and made between [*parties*] being a settle-  
ment made in consideration of the marriage shortly  
afterwards solemnised between *A.B.* and                      the  
hereditaments hereinafter mentioned stand limited to the  
use of *A.B.* during his life without impeachment of waste  
with remainders over NOW THIS INDENTURE WITNESSETH  
that in consideration of £                      paid to *A.B.* by *C.D.*  
for the purchase of the life estate of *A.B.* in the said  
hereditaments (of which sum *A.B.* hereby acknowledges  
the receipt) *A.B.* as beneficial owner hereby conveys to  
*C.D.* All &c. [*parcels*] To hold unto and to the use of  
*C.D.* during the life of *A.B.*

In witness, &c.

No. 5.

*Conveyance of Freeholds by Two Tenants in Common.*

THIS INDENTURE made the                      day of  
between *A.B.* of &c. [*the owner of one moiety*] of the first  
part *C.D.* of &c. [*the owner of the other moiety*] of the  
second part and *E.F.* of &c. [*purchaser*] of the third part  
[*Recite the will of G.H. devising the property to his two sons  
A.B. and C.D. in fee simple in equal shares as tenants in  
common,—the death of G.H. and probate of his will*] NOW  
THIS INDENTURE WITNESSETH that in consideration of the  
sum of £                      paid by *E.F.* to *A.B.* and *C.D.* for the  
purchase of the fee simple of the hereditaments herein-  
after mentioned (of which sum *A.B.* and *C.D.* do hereby

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**Forms.** acknowledge the receipt) *A.B.* as beneficial owner of one moiety of and in the hereditaments hereinafter mentioned And *C.D.* as beneficial owner of the other moiety of and in the said hereditaments do hereby respectively convey to *E.F.* All &c. [*parcels*] To hold unto and to the use of *E.F.* in fee simple (*a*).

In witness, &c.

(*a*) The covenants implied by sect. 7, relate to each person conveying as far only as regards the share of subject-matter conveyed by him.

No. 6.

*Conveyance of Freeholds by Husband to Wife (a).*

This INDENTURE made the                      day of                      between *A.B.* of &c. [*husband*] of the one part and *C.B.* [*wife of A.B.*] of the other part WITNESSETH that in consideration of the sum of £                      paid to *A.B.* by *C.B.* out of money belonging to her for her (*b*) separate use for the purchase of the fee simple of the hereditaments hereinafter mentioned (the payment whereof out of money belonging to *C.B.* for her separate use *A.B.* hereby admits, and of which sum *A.B.* hereby acknowledges the receipt) *A.B.* as beneficial owner hereby conveys to *C.B.* his wife All &c. [*parcels*] To hold unto and to the use of *C.B.* in fee simple for her separate use.

In witness, &c.

(*a*) Freehold land may by sect. 50, be conveyed by a husband to his wife alone or *vice versa*.

(*b*) Although a husband can now convey direct to his wife, it is assumed that such a conveyance will be voidable to the same extent and under the same circumstances as an ordinary voluntary settlement by the husband to a trustee for the benefit of his wife, unless there is evidence to show that the wife out of money belonging to her for her separate use purchased the

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lands from her husband for a sum reasonably equivalent to its money value. Apparently section 50 does not do away with the necessity of the husband's concurrence in a conveyance by the wife to another person, although the property was conveyed by her husband to her for her separate use.

On the question of consideration see Dart 5th Edit. 890. It may be mentioned that there is no use in stating imaginary considerations; it is true that sect. 55 makes the receipt for consideration "sufficient" evidence in favour of a subsequent purchaser without notice, but then as the law stands a voluntary conveyance cannot be avoided against a purchaser for value *with* notice that his vendor is a volunteer. The mere absence of expressed consideration will not make the conveyance inoperative; so long as the words "to the use of" the grantee are inserted, the use cannot result. See notes to Tyrrell's Case, Tudor's Leading Cases. *Quære* whether this is not also the case by virtue of sect. 50.

The formalities prescribed by the Fines and Recoveries Act. must still be observed in conveyances by a married woman.

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No. 7.

*Conveyance of Freeholds by a Mortgagee, Mortgagor not joining.*

This INDENTURE made the                      day of  
between A.B. of &c. [*mortgagee*] of the one part and C.D.  
of &c. [*purchaser*] of the other part Whereas by an inden-  
ture dated the                      day of                      and made between  
E.F. [*mortgagor*] of the one part and A.B. of the other part  
the hereditaments hereinafter mentioned were conveyed by  
E.F. to A.B. in fee simple by way of (a) mortgage for  
securing £                      and interest (b) NOW THIS INDEN-  
TURE WITNESSETH that in consideration of £                      paid  
by C.D. to A.B. for the purchase of the fee simple of the  
hereditaments hereinafter mentioned (the receipt whereof

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**Forms.** *A.B.* hereby acknowledges) *A.B.* as mortgagee (c) and in exercise of the power of sale vested in him by the said indenture hereby conveys to *C.D.* All &c. [*parcels*] To hold the same unto and to the use of *C.D.* (d) in fee simple (e) discharged from the equity of redemption and all claims under the before-mentioned indenture (f).

In witness, &c.

(a) If the mortgage is made in the statutory form the proviso for redemption is by sect. 26 implied in the mortgage deed.

(b) The mortgage deed recited in this conveyance is assumed to be one made after the 31st December, 1881. If the mortgage is of a prior date, the power of sale, &c., contained in the mortgage deed should be in recital.

(c) When the conveyance is made in professed exercise of an implied power of sale the purchaser is protected by sect. 21 (2).

(d) Sect. 51.

(e) Sect. 7.

(f) A covenant against incumbrances by the mortgagee is implied under sect. 7, sub-sect. 1 (F).

## No. 8.

### *Conveyance of Freeholds by a Mortgagee and Mortgagor.*

THIS INDENTURE made the                      day of                      between *A.B.* of &c. [*mortgagor*] of the first part *C.D.* of &c. [*mortgagee*] of the second part and *E.F.* of &c. [*purchaser*] of the third part Whereas by an indenture dated the                      day of                      and made between *A.B.* of the one part and *C.D.* of the other part the hereditaments hereinafter mentioned were conveyed by *A.B.* to *C.D.* in fee simple by way of mortgage for securing £                      and interest (a) And whereas the said principal sum of £                      remains due but all interest thereon has been

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paid as *C.D.* hereby acknowledges NOW THIS INDENTURE  
WITNESSETH that in consideration of the sum of £

paid by the direction of *A.B.* to *C.D.* (of which sum *C.D.*  
hereby acknowledges the receipt) and of the sum of  
£ paid to *A.B.* making together the total sum of  
£ paid by *E.F.* for the purchase of the fee simple  
of the hereditaments hereinafter mentioned (of which total  
sum of £ *A.B.* hereby acknowledges the payment

and receipt in manner before-mentioned) *C.D.* (*b*) as mort-  
gagee and by the direction of *A.B.* as beneficial owner  
hereby conveys and *A.B.* as beneficial owner hereby con-  
veys and confirms to *E.F.* All &c. [*parcels*] To hold the  
same unto and to the use of *E.F.* in fee simple discharged  
from all moneys secured by and from all claims under the  
before-mentioned indenture.

In witness, &c.

(*a*) When a mortgage deed is made in the statutory form the  
proviso for redemption with re-conveyance is implied (sect. 26).

(*b*) The covenant by mortgagee against incumbrances is  
implied. Sect. 7, sub-sect. 1 (F).

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No. 9.

*Conveyance of the Equity of Redemption in Freeholds to a  
Mortgagee as Purchaser.*

THIS INDENTURE made the            day of  
between *A.B.* of &c. [*mortgagor and vendor*] of the one part  
and *C.D.* of &c. [*purchaser*] of the other part Whereas by  
an indenture dated the            day of            and made  
between [*parties*] the hereditaments hereinafter mentioned  
were conveyed by *A.B.* to *C.D.* in fee simple by way of  
mortgage for securing £            and interest thereon at  
the rate of            per centum per annum And whereas  
the said principal sum of £            remains due to *C.D.*  
but all interest thereon has been paid up to the date of

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**Forms.** these presents And whereas *A.B.* has agreed to sell to *C.D.* the fee simple in possession of the said hereditaments at the price of £                      And it has been agreed that the said mortgage debt of £                      should be retained by *C.D.* out of the said purchase money NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £                      whereof £                      has been retained by *C.D.* in full satisfaction of the said mortgage debt from which *C.D.* hereby releases *A.B.* and the remaining £                      has been paid by *C.D.* to *A.B.* (the receipt whereof *A.B.* doth hereby acknowledge) *A.B.* as beneficial owner hereby conveys to *C.D.* All &c. [*parcels*] To hold unto and to the use of *C.D.* in fee simple.

In witness, &c.

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No. 10.

*Conveyance of the Equity of Redemption in Freeholds by Deed annexed or indorsed.*

This INDENTURE made the                      day of                      between *A.B.* of &c.                      of the one part and *C.D.* of &c.                      of the other part supplemental to (a) [an indenture of mortgage made the                      day of                      between (*parties*)] Whereas *A.B.* has agreed to sell to *C.D.* the fee simple in possession of the hereditaments comprised in [the above mentioned indenture of mortgage] for the sum of £                      NOW THIS INDENTURE WITNESSETH (b) [*Conveyance of Freeholds*]

In witness, &c.

(a) If the conveyance is indorsed on the mortgage deed, omit the words between the brackets and insert [the within written indenture of mortgage].

(b) The mortgagee may then give the mortgagor a receipt for the mortgage debt as part payment. See *Ex parte National Mercantile Bank*, 15 Ch. D. 42.

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No. 11.

Forms.

*Conveyance of Leaseholds to Purchaser.*

This INDENTURE made the                      day of  
between A.B. of &c. [*vendor*] of the one part and C.D. of  
&c. [*purchaser*] of the other part Whereas by an inden-  
ture of lease dated the                      day of                      and made  
between [*parties*] All &c. [*parcels from lease*] were demised  
unto A.B. (*a*) [*his executors administrators and assigns*] from  
the                      day of                      for the term of                      years  
at the yearly rent of £                      and subject to covenants  
by the lessee and conditions therein contained Now THIS  
INDENTURE WITNESSETH that in consideration of £  
paid to A.B. by C.D. for the purchase of the lessee's interest  
in the said lease (of which sum A.B. hereby acknowledges  
the receipt) A.B. as beneficial owner hereby conveys to  
C.D. All those the hereditaments and premises comprised  
in and demised by the hereinbefore recited indenture of  
lease To hold unto C.D. for the residue of the said term  
of                      years at the yearly rent and subject to the cove-  
nants by the lessee and the conditions in the said lease  
reserved and contained and henceforth to be paid per-  
formed and observed And C.D. hereby covenants (*b*) with  
A.B. that he C.D. will henceforth pay the rent by the said  
lease reserved and perform all the covenants by the lessee  
therein contained And will at all times hereafter keep  
indemnified A.B. and his estate and effects from and  
against the payment of the said rent and the observance  
and performance of the said covenants and conditions and  
from all actions claims and demands whatsoever for or on  
account of the same or in anywise relating thereto.

In witness, &c.

(*a*) If the recital is of a lease granted prior to the 31st  
December, 1881, the words in brackets should be inserted. If

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**Forms.** the lease is of a later date these words may be omitted.  
 — Sect. 58.

(b) The covenant for payment of rent and performance of covenants and indemnity is not included in the implied covenants set out in the Act, and must therefore in proper cases be inserted for the vendor's protection. Sect. 7.

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No. 12.

*Covenant to surrender Copyholds (a).*

This INDENTURE made the            day of  
 between *A.B.* of &c. [*rentor*] of the one part and *C.D.* of  
 &c. [*purchaser*] of the other part (b) Whereas *A.B.* is  
 seised for an unincumbered estate of inheritance in fee  
 simple according to the custom of the manor of            in  
 the county of            of the hereditaments and premises  
 hereinafter covenanted to be surrendered and has agreed to  
 sell the same to *C.D.* for the sum of £            Now THIS  
 INDENTURE WITNESSETH that in pursuance of the said  
 agreement and in consideration of the sum of £            paid  
 to *A.B.* by *C.D.* for the purchase of the absolute inheritance  
 in possession of the hereditaments and premises hereinafter  
 covenanted to be surrendered (of which sum *A.B.* hereby  
 acknowledges the receipt) He *A.B.* as beneficial owner  
 hereby covenants with *C.D.* that he *A.B.* will forthwith at  
 the cost of *C.D.* surrender or cause to be surrendered into  
 the hands of the lord of the manor of            in the  
 county of            according to the custom of the said  
 manor All &c. [*parcels*] To the use of *C.D.* according to  
 the custom of the said manor by and under the suits ser-  
 vices rents fines and heriots therefor due and of right  
 accustomed.

In witness, &c.

(a) By sect. 7, sub-sect. 5, it is enacted that a conveyance includes a deed conferring the right of admittance to copyhold

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or customary land. The covenants for title by vendor are by virtue of that section implied; and see also sect. 2 (v.) *ante*, p. 3. Forms.

(b) See note (a), *ante*, p. 151.

No. 13.

*Enlargement of Residue of Long Term into a Fee Simple (a).*

To all to whom these presents shall come *A.B.* of &c. sends greeting Whereas these presents are supplemental to an indenture of lease dated the            day of            and made between [*parties*] And whereas the residue of the term [created by the said indenture of lease is now vested in *A.B.* absolutely and *A.B.* is beneficially entitled to the possession of the hereditaments and premises demised by the said indenture of lease [(b) or as the case may be] Now these presents witness that *A.B.* as the person so beneficially entitled hereby declares that from and after the execution of these presents the term created by the said indenture of lease shall be and the same is hereby enlarged into a fee simple.

In witness, &c.

(a) By sect. 65 the residue of a long term may now be enlarged into a fee simple, subject to certain conditions and obligations there set out. As to the stamp duty required, see note to sect. 65, *ante*, p. 126.

(b) Viz. in the case of a trustee, executor, &c., as to the persons who may enlarge the term into a fee, see sect. 65, subsect. 2, *ante*, p. 123.

No. 14.

*Mortgage of Freeholds to one.*

THIS INDENTURE of Mortgage made the            day of            between *A.B.* of &c. [*mortgagor*] of the one part

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**Forms.** and *C.D.* of &c. [*mortgagee*] of the other part Whereas *A.B.* is seised in unincumbered fee simple in possession of the hereditaments hereinafter expressed to be hereby conveyed NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £            paid to *A.B.* by *C.D.* (of which sum *A.B.* hereby acknowledges the receipt) *A.B.* hereby covenants with *C.D.* to pay to him on the            day of            the sum of £            with interest thereon in the meantime at the rate of £            per cent. per annum and also as long after that day as any principal money remains due under this mortgage to pay to *C.D.* interest thereon at the same rate by equal half-yearly payments on the            day of            and the            day of            AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.B.* as beneficial owner hereby conveys to *C.D.* All &c. [*parcels*] To hold unto and to the use of *C.D.* in fee simple subject to the proviso for redemption following (namely) that if *A.B.* or any person claiming under him shall on the            day of            pay to *C.D.* the sum of £            and interest thereon at the rate aforesaid then *C.D.* or the person claiming under him will at the request and cost of *A.B.* or the persons claiming under him re-convey the said hereditaments and premises to *A.B.* or the persons claiming under him (*a*) And *A.B.* hereby covenants (*b*) with *C.D.* as follows: [That he *A.B.* will not at any time hereafter make or enter into any agreement to make any lease (*c*) of the said hereditaments and premises or any part thereof without the previous consent in writing of *C.D.*] [And it is hereby agreed and declared that *A.B.* shall not be entitled to redeem the said hereditaments and premises without first paying to *C.D.* any money that may be due to *C.D.* on any other mortgage executed by *A.B.* or by any person through whom he claims (*d*)] [And it is further agreed and declared that *C.D.* may at any time

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without any further consent on the part of *A.B.* demise or enter into any agreement to demise the said hereditaments and premises or any part thereof upon any terms he thinks fit provided always that this power shall not be exercised until such time as he is by law empowered to sell provided also that no lessee under the aforesaid power shall be bound to inquire whether such time has arrived or be affected by notice that such time has not arrived ; And it is further agreed that the said power may be exercised by the person who for the time being is by law empowered to sell (e)] (*Here add covenant as to (f) fire insurance or any other special covenant required.*)

In witness, &c.

(a) A mortgagor can under sect. 15 compel the mortgagee to transfer to any third person instead of re-conveying the mortgaged property.

(b) Covenants for title are implied by sect. 7. The usual powers of sale, to insure, to appoint, a receiver and to cut timber are implied by sect. 19.

(c) A mortgagor while in possession has power under this Act to make leases of the mortgaged land under certain conditions specified in sect. 18. This covenant should be omitted if the mortgagee does not consider it necessary thus to restrict the mortgagor's powers of leasing.

(d) This agreement should be inserted in the deed if it is intended to exclude the operation of sect. 17 with regard to the restriction on consolidation of mortgages.

(e) As to the leasing powers of mortgagor and mortgagee see sect. 18. If the intention is that the mortgagee should not be restricted this clause should be inserted.

(f) A mortgagee's power to insure is implied in every mortgage deed by sect. 19. As to restrictions on the exercise of that power, see sect. 23, and also see note thereto on p. 57, *ante* as to the advisability of inserting a stipulation in the deed that the insurance money shall be applied in re-instating the buildings.

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Forms.

No. 15.

*Mortgage of Copyholds.*

This INDENTURE of mortgage made the                    day of  
between A.B. of &c. [*mortgagor*] of the one part  
and C.D. of &c. [*mortgagee*] of the other part WITNESSETH  
that in consideration of £                    paid to A.B. by C.D. (of  
which sum A.B. hereby acknowledges the receipt) A.B.  
hereby covenants with C.D. to pay to him on the  
day of                    the sum of £                    with interest thereon  
in the meantime at the rate of                    per cent. per  
annum and also as long after that day as any principal  
money remains due under this mortgage to pay to C.D.  
interest thereon at the same rate by equal half-yearly  
payments on the                    day of                    and the  
day of                    AND THIS INDENTURE ALSO  
WITNESSETH that for the same consideration A.B. as  
beneficial owner hereby (a) covenants with C.D. that  
the A.B. will forthwith at his own cost effectually  
surrender or cause to be surrendered into the hands of  
the lord of the manor of                    according to the custom  
of the said manor All &c. [*parcels*] To the use of C.D.  
according to the custom of the said manor by and under  
the rents fines suits and services therefor due and of right  
accustomed subject nevertheless to a proviso for making  
void the said surrender in case A.B. or any person claim-  
ing under him shall on the                    day of                    pay  
to C.D. the sum of £                    with interest thereon at the  
rate aforesaid. [*Here insert covenants by A.B. as in  
precedent, No. 14*]

In Witness, &c.

(a) See sect. 7, sub-sects. 4, 5.

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No. 16.

Forms.

*Mortgage of Leaseholds.*

This INDENTURE made the                      day of  
between *A.B.* of &c. [*mortgagor*] of the one part and *C.D.*  
of &c. [*mortgagee*] of the other part Whereas by an  
indenture of lease dated &c. and made between [*parties*]  
All &c. [*parcels*] were demised unto *A.B.* from the  
day of                      for the term of                      years at the yearly  
rent of £                      and under and subject to covenants and  
conditions therein contained and on the part of the lessee  
to be observed and performed WITNESSETH that in con-  
sideration of £                      paid to *A.B.* by *C.D.* (of which  
sum *A.B.* hereby acknowledges the receipt) *A.B.* hereby  
covenants with *C.D.* to pay to him on the                      day of  
the said sum of £                      with interest thereon  
in the meantime at the rate of                      per cent. per annum  
and also as long after that day as any principal money  
remains due under this mortgage to pay to *C.D.* interest  
thereon at the same rate by equal half-yearly payments  
on the                      day of                      and the                      day of  
AND THIS INDENTURE ALSO WITNESSETH that  
for the same consideration *A.B.* as beneficial owner hereby  
conveys to *C.D.* All those the hereditaments and premises  
comprised in and demised by the hereinbefore recited  
indenture of lease To hold unto *C.D.* for the residue of  
the said term of                      years (a) except the last three  
days thereof subject to the proviso for redemption [*as in*  
*precedent, No. 14*] (b) (c) And it is hereby agreed that  
after a sale under the power given by law to a mortgagee  
*A.B.* or the person or persons in whom for the time being  
the said term of                      years granted by the said inden-  
ture of lease shall be vested shall stand possessed of the  
hereditaments sold for and during the last three days of

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Forms. the said term upon trust for the purchaser to be conveyed as he may direct.

In witness, &c.

(a) A mortgage of leaseholds is generally made by way of demise when the rent reserved by the lease is not a nominal one, or when the covenants are onerous. Unless the last few days are reserved the mortgage deed will operate by way of assignment as the word "convey" includes an assignment. See sect. 2 (v.), *ante*, p. 2.

(b) Covenants for title are implied by sect. 7, and in a conveyance by way of mortgage of leasehold property the further covenants that the lease is valid and for payment of rent and performance of covenants are also implied. See sect. 7, sub-sect. 1 (D).

(c) As to the mortgagor covenanting to insure the premises. See note (f) *ante*, p. 163.

#### No. 17.

##### *Further Charge.*

This INDENTURE made the                      day of  
between A.B. of &c. [*mortgagor*] and C.D. of &c. [*mortgagee*]  
and supplemental to an indenture of mortgage dated the  
                    day of                      188    and made between the same  
parties for securing the sum of £                      and interest  
at                      per cent. per annum on property known as  
                    situate &c. and containing                      acres as  
therein mentioned WITNESSETH that in consideration of  
the further sum of £                      paid to A.B. by C.D. (of  
which sum A.B. hereby acknowledges the receipt) A.B.  
hereby covenants with C.D. to pay to him on the  
day of                      188    the said sum of £                      with  
interest thereon in the meantime at the rate of

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Forms.

per cent. per annum and also as long after that day as any principal money remains due under this mortgage to pay to *C.D.* interest thereon at the same rate by equal half-yearly payments on the            day of            and the            day of            and further that all the property comprised in the before-mentioned indenture of mortgage shall stand charged with the payment to *C.D.* of the sum of £            and the interest thereon hereinbefore covenanted to be paid as well as the sum of £            and interest secured by the same indenture.

In witness, &c.

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No. 18.

*Transfer of a Mortgage of Freeholds, Mortgagor not being a party.*

This INDENTURE made the            day of            between *A.B.* of &c. [*mortgagee*] of the one part and *C.D.* of &c. [*transferee*] of the other part Whereas by an indenture of mortgage dated the            day of            and made between *E.F.* of the one part and *A.B.* of the other part In consideration of the sum of £            paid to *E.F.* by *A.B.* *E.F.* conveyed the hereditaments herein-after described and mentioned unto and to the use of *A.B.* in fee simple subject to a proviso therein contained for the redemption of the same lands on payment by *E.F.* unto *A.B.* of the sum of £            with interest for the same at the rate of £            per cent. per annum on the            day of            And whereas the said sum of £            together with £            for interest thereon from the            day of            is now owing to *A.B.* on the said security And whereas *C.D.* has agreed to pay to *A.B.* the said sums of £            and £            making

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**Forms.** — together the sum of £                      upon having such transfer of the said mortgage debt and of the securities for the same as is hereinafter contained. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the sum of £                      paid to *A.B.* by *C.D.* (of which sum *A.B.* hereby acknowledges the receipt) he *A.B.* hereby conveys and transfers unto *C.D.* All that the said principal sum of £                      secured by the hereinbefore recited indenture as aforesaid and all interest henceforth to become due in respect of the same and the full benefit of the covenants and other powers and provisions contained in the same indenture for securing the payment of the said principal sum and interest to have receive and take the said principal sum and interest and all other the premises hereby conveyed and transferred unto *C.D.* absolutely. AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreement and for the consideration aforesaid *A.B.* as mortgagee hereby conveys unto *C.D.* All &c. [*parcels*] To hold unto and to the use of *C.D.* in fee simple subject to such equity of redemption as is now subsisting in the said hereditaments and premises under or by virtue of the hereinbefore recited indenture.

In witness, &c.

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### No. 19.

*Transfer of a Mortgage of Freeholds, in which the Mortgagor joins.*

This INDENTURE made the                      day of                      between *A.B.* of &c. [*mortgagee*] of the first part *C.D.* of &c. [*mortgagor*] of the second part and *E.F.* of &c. [*transferee*] of the third part Whereas by an indenture of mortgage dated &c. and made between *C.D.* of the one

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part and *A.B.* of the other part *C.D.* in consideration of the sum of £                      conveyed the hereditamentss hereinafter mentioned and described unto and to the use of *A.B.* subject to a proviso therein contained for the redemption of the hereditaments upon payment by *C.D.* to *A.B.* of the sum of £                      with interest for the same at the rate of

per cent. per annum on the                      day of

And whereas the said sum of £                      is still owing to *A.B.* on the security of the hereinbefore recited indenture but all interest for the same has been paid up to the date of these presents And whereas *E.F.* at the request of *C.D.* has agreed to pay to *A.B.* the sum of £                      on having a transfer of the said mortgage debt and the interest thereof and the securities for the same in manner hereinafter mentioned NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £                      paid to *A.B.* by *E.F.* (of which sum *A.B.* hereby acknowledges the receipt) *A.B.* hereby conveys unto *E.F.* All that the said principal sum of £                      secured by the hereinbefore recited indenture as aforesaid and all interest henceforth to become due in respect of the same and the full benefit of the covenants and other powers and provisions contained in the same indenture for securing the payment of the said principal sum and interest To have and take the said principal sum and interest unto *E.F.* absolutely AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.B.* as mortgagee hereby conveys and *C.D.* as beneficial owner hereby conveys and confirms unto *E.F.* All &c. [*parcels*] To hold the same unto and to the use of *E.F.* in fee simple subject to such right or equity of redemption as is now subsisting therein under and by virtue of the hereinbefore recited indenture of mortgage (*a*).

In witness, &c.

(*a*) The covenant by the transferor against incumbrances is implied. Sect. 7, sub-sect. 1 (F).

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## Forms.

## No. 20.

*Re-conveyance of Freeholds or Leaseholds.*

This INDENTURE made the                      day of  
 between *A.B.* of &c. [*mortgagee*] of the one part and *C.D.*  
 of &c. [*mortgagor*] of the other part and supplemental to  
 an indenture of mortgage dated the                      day of  
                     and made between the same parties for securing  
 the principal sum of £                      and interest at                      per cent.  
 per annum on property at                      being the hereditaments  
 and premises therein mentioned WITNESSETH that in  
 consideration of the said principal sum of £                      and  
 all interest due under the said indenture of mortgage  
 having been paid to *A.B.* by *C.D.* (of which principal sum  
 and interest *A.B.* hereby acknowledges the receipt) *A.B.*  
 as (*a*) mortgagee hereby conveys to *C.D.* all the heredita-  
 ments and premises mentioned in the said indenture of  
 mortgage To hold the same unto and to the use of *C.D.* in fee  
 simple (*or in the case of leaseholds* for the residue of the term  
 created by the said indenture of lease (*b*) mentioned in the  
 said indenture of mortgage) freed and absolutely discharged  
 from all principal money and interest secured by the said  
 indenture of mortgage and all claims and demands on  
 account thereof respectively or any part thereof respec-  
 tively or in anywise relating thereto.

In witness, &c.

(*a*) The covenant against incumbrances on the part of the mortgagee is implied. Sect. 7, sub-sect. 1 (F).

(*b*) This form of re-conveyance of leaseholds assumes that the mortgage was made by way of assignment. If made by way of demise insert the words [except the last                      days thereof].

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## No. 21.

## Forms.

*Marriage Settlement.*

THIS INDENTURE made the                      day of                      between *A.B.* of &c. [*intended husband*] of the first part *C.D.* of &c. [*intended wife*] of the second part and *E.F.* of &c. and *G.H.* of &c. [*trustees*] of the third part WITNESSETH that in consideration of the intended marriage between *A.B.* and *C.D.* *A.B.* as settlor hereby conveys to *E.F.* and *G.H.* All &c. [*parcels*] To hold the same unto *E.F.* and *G.H.* in fee simple to the use of *A.B.* in fee simple until the marriage and after the marriage to the use of *A.B.* during his life without impeachment of waste with remainder after his death to the use that *C.D.* if she survives him may receive during the rest of her life a yearly jointure rentcharge of £                      to commence from his death and to be paid by equal half-yearly payments the first thereof to be made at the end of six calendar months from his death if she is then living or if not a proportional part to be paid at her death and subject to the before-mentioned rentcharge to the use of *E.F.* and *G.H.* for a term of 500 years without impeachment of waste on the trusts hereinafter declared and subject thereto to the use of the first and other sons of *A.B.* and *C.D.* successively according to seniority in tail male with remainder [*here insert, if thought desirable, to the use of the same first and other sons successively according to seniority in tail with remainder*] to the use of all the daughters of *A.B.* and *C.D.* in equal shares as tenants in common in tail with cross remainders between them in tail with remainder to the use of *A.B.* in fee simple. [*Insert trusts of term of 500 years for raising portions; also, if required, power to charge jointure and portions on a future marriage; also powers of sale, exchange, and partition, and other powers and provisions, if and as desired.*]

In witness, &c.

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Forms.

## No. 22.

*Appointment of a New Trustee in place of one who retires.*

This INDENTURE made the                      day of                      between *A.B.* of &c. [*the person empowered to appoint trustees*] of the first part *C.D.* of &c. [*the retiring trustee*] of the second part *E.F.* of &c. and *G.H.* of &c. [*the continuing trustees*] of the third part and *M.W.* of &c. [*the new trustee*] of the fourth part And supplemental to an indenture made the                      day of                      between &c. (a) [*the indenture creating the trust*] WITNESSETH that *A.B.* in exercise of the power for this purpose given him by the said indenture hereby appoints *M.W.* to be a trustee under the said indenture (b) And *C.D.* hereby declares that he is desirous of retiring and being discharged from the trusts created by the said indenture And *A.B.* *E.F.* *G.H.* and *M.W.* hereby consent to the discharge of *C.D.* from the said trusts and to the vesting in *E.F.* *G.H.* and *M.W.* alone of the property subject to the said trusts (c) And *A.B.* *C.D.* *E.F.* *G.H.* and *M.W.* hereby declare that all estates and interests vested in *C.D.* *E.F.* and *G.H.* by the said indenture [*or indentures or any of them*] and subject to the said trusts shall henceforth be vested in *E.F.* *G.H.* and *M.W.* as joint tenants and for the purposes of the said trusts.

In witness, &c.

(a) If there have been subsequent appointments of new trustees, this indenture should be made supplemental to them. If the trusts are created by will, the will and probate must be recited. If trustees have died or gone abroad, &c., these facts should be recited.

(b) By sect. 31 (5) a trustee appointed by writing may as well before as after the trust property is vested in him act in all respects as if he had originally been appointed by the instrument creating the trust.

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(c) If there is no retiring trustee this declaration and consent must be omitted, and in that case the declaration vesting the property will be made by the appointor alone. Sect. 34 (1). When a trustee is to be discharged the appointor and confirming trustees must consent (sect. 32) and the vesting declaration must be made by the appointor and the continuing and retiring trustees. Sect. 34 (2).

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No. 23.

*Deed discharging one of three (or more) Trustees and vesting the Trust Property in the two (or more) continuing Trustees (a).*

(b) This INDENTURE made the                      day of  
between A.B. of &c. [*the retiring trustee*] of the one part  
and C.D. of &c. [*the other person, if any, empowered to  
appoint trustees*] of the second part and E.F. of &c. and  
G.H. of &c. [*continuing trustees*] of the third part And (c)  
supplemental to an indenture made the                      day of  
&c. [*The deed creating the trust and the last  
appointment of new trustees, or if the trust is created by a  
will recite the will and probate*] WITNESSETH that A.B.  
hereby declares that he is desirous of retiring and being  
discharged from the trusts created by the said indentures  
[*or will*] And (d) C.D. E.F. and G.H. hereby consent to  
the retirement and discharge of A.B. from the said trusts  
and to the vesting of the property in C.D. and E.F. subject  
to the said trusts And A.B. C.D. E.F. and G.H. hereby  
declare that all estates and interests in the property (e)  
subject to the said trusts shall henceforth be vested in  
E.F. and G.H. as joint tenants and for the purposes of the  
said trusts.

In witness, &c.

(a) See sect. 32, *ante*, p. 76.

(b) One of two or a sole trustee cannot retire in this way.

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## Forms.

(c) Sect. 53, *ante*, p. 109.

(d) If there is any person other than the continuing trustees empowered to appoint trustees, that person should be a party and should join in the consent and vesting declaration.

(e) This declaration will not vest some kinds of property. See sect. 34 (3).

## No. 24.

*Acknowledgment of right to production of Documents of Title (a).*

Whereas by an INDENTURE dated the                      day of                      and made between [*parties*] certain freehold hereditaments known as                      were conveyed by *A.B.* unto and to the use of *C.D.* in fee simple And whereas the documents of title mentioned in the schedule hereto relate as well to the hereditaments comprised in the hereinbefore recited indenture as to other hereditaments and are in the possession of *A.B.* And it has been agreed that *A.B.* shall retain the said documents of title and shall enter into the acknowledgment and undertaking hereinafter contained. Now *A.B.* hereby acknowledges the right of *C.D.* to production of the said documents of title and to delivery of copies thereof and *A.B.* hereby undertakes for the safe custody thereof.

Dated the                      day of                      188 .

The Schedule above referred to.

[*To contain list of documents retained by A.B.*]

(a) Sect. 29, *ante*, p. 29.

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No. 25.

Forms.

*Power of Attorney of (a) a Married Woman to execute a Deed.*

KNOW ALL MEN by these presents that I *C.B.* [*appointor*] the wife of *A.B.* of &c. hereby appoint *M.W.* of &c. my attorney in my name and stead and on my behalf to receive from [*purchaser*] or his agent or attorney the sum of £ together with all interest (if any) for the same sum being the price agreed to be paid by the said [*purchaser*] to me for the purchase of certain hereditaments known as situate &c. [and containing acres or thereabouts] and upon the receipt of the said sum of £ with interest as aforesaid in my name (*b*) and on my behalf and as my act and deed to sign seal and deliver a certain indenture already prepared and engrossed bearing date on or about the day of and expressed to be made between [*parties*] and being a conveyance of the said hereditaments and premises unto and to the use of the said [*purchaser*] in fee simple [*or otherwise as the case may be*] [And (*c*) also in my name and on my behalf to indorse and sign on the said indenture a proper and effectual receipt for the said sum of £ and for all interest (if any) due thereon] And also in my name and on my behalf to execute and do all other deeds and things which my said attorney may consider expedient or necessary for conveying the said hereditaments and premises unto and to the use of the [*purchaser*] in fee simple [*or, to the uses hereinbefore mentioned*] I hereby undertaking to ratify and confirm all that my said attorney shall lawfully do or purport to do in or about the premises by virtue of these presents.

In witness, &c.

(*a*) A married woman, whether an infant or not, may by sect. 40 appoint an attorney for the purpose of executing any deed,

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**Forms.** &c. This power of attorney will enable the attorney to execute any deed which the married woman might execute, but where she is an infant it will not make the deed of any greater validity than if she herself had executed it. A married woman apparently cannot avoid the formalities prescribed by the Fines and Recoveries Act merely by executing the deed by an attorney. See *Graham v. Jackson*, 6 Q. B. 811. Shelford, 8th Edit. 375. As to the execution of a power of attorney, see note to sect. 40, *ante*, p. 87.

(b) See sect. 46, *ante*, p. 102.

(c) Sect. 54 makes the receipt in the body of the deed a sufficient discharge.

#### No. 26.

##### *Power of Attorney for a Solicitor to execute a Deed of Conveyance on a Sale.*

KNOW ALL MEN by these presents that I *A.B.* of &c. hereby appoint *C.D.* of &c. a solicitor of                      to be my attorney on my behalf to sign seal and deliver a certain indenture already engrossed dated the                      day of                      and expressed to be made between [*parties*] being a conveyance of certain hereditaments known as                      and situate at                      unto and to the use of *E.F.* in fee simple [*or as the case may be*] And also on my behalf to execute and do all other deeds and things which *C.D.* may consider expedient or necessary for conveying the hereditaments and premises as aforesaid.

In witness, &c.

#### No. 27.

##### *Statutory Declaration by Attesting Witness.*

I *A.B.* of [*residence and description of deponent*] do solemnly and sincerely declare

1. That I saw [*name of appointor*] sign seal and as his

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act and deed deliver the indenture [*or deed poll*] hereunto annexed marked with the letter "M." **Forms.**

2. That the signature " " set and subscribed to the said indenture [*or deed poll*] is of the proper handwriting of the said [*appointor*]

And I make this solemn DECLARATION conscientiously believing the same to be true and by virtue of the provisions of an Act made and passed in the 6th year of the reign of His late Majesty William the Fourth intituled the (a) Statutory Declarations Act, 1835.

Declared at, &c.

(a) Sect. 68, *ante*, p. 129.

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# THE SOLICITORS REMUNERATION ACT, 1881.

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44 & 45 VICT. CHAP. 44.

AN ACT for making better provision respecting the Remuneration of Solicitors in conveying and other non-contentious Business. Sect. 1.

[22nd August, 1881.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows :

## *Preliminary.*

**1.**—(1.) This Act may be cited as the Solicitors Remuneration Act, 1881. Short title ; extent ; interpretation.

(2.) This Act does not extend to Scotland.

(3.) In this Act—

“ Solicitor ” means a solicitor or proctor qualified according to the statutes in that behalf :

“ Client ” includes any person who, as a principal, or on behalf of another, or as trustee or executor, or in any other capacity, has

Sect. 1.

power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ, a solicitor, and any person for the time being liable to pay to a solicitor, for his services, any costs, remuneration, charges, expenses, or disbursements :

“Person ” includes a body of persons corporate or unincorporate :

“Incorporated Law Society” means in England, the society referred to under that title in the Act passed in the session of the twenty-third and twenty-fourth years of Her Majesty’s reign, intituled “An Act to amend the Laws relating to Attorneys, Solicitors, Proctors, and Certificated Conveyancers”; and, in Ireland, the society referred to under that title in the Attorney and Solicitors Act, Ireland, 1866 :

29 & 30  
Vict. c. 84.

“Provincial law societies or associations” means all bodies of solicitors in England incorporated by Royal Charter, or under the Joint Stock Companies Act, other than the Incorporated Law Society above mentioned.

Principle  
of remun-  
eration of  
Solicitors.

This Act makes important alterations in the remuneration of solicitors, and introduces the principle of remuneration in conveyancing matters by a scale of rates of commission or percentage ; and professional charges will not hereafter depend upon the number of folios in each document, but rather according to the skill, labour, and responsibility involved in any business transaction on the part of the solicitor.

“Solicitor.”

A solicitor is defined by this section as meaning one qualified according to the statutes on that behalf. The

statutes principally affecting solicitors are as follows:—  
 6 & 7 Vict. c. 73; 23 & 24 Vict. c. 127; 33 & 34 Vict. c. 28; the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 87, amended by the Judicature Act, 1875, s. 14; 37 & 38 Vict. c. 68; the Legal Practitioners Act, 1876 (39 & 40 Vict. c. 66); and the Solicitors Act, 1877 (40 & 41 Vict. c. 25 ss. 15—21).

Note to  
 Sect. 1.

As to the meaning of “privileges” in sect. 87 of the Judicature Act with regard to solicitors, see *Grant v. Holland*, 3 C. P. D. 183.

The term “client,” as defined in this section, has a more extensive meaning than that placed upon it in sect. 3 of the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), and includes trustee or executor, or person in any other capacity; and see *Ward v. Eyre*, 15 Ch. D. 130.

This section interprets the term “person” as including a body of persons, corporate or unincorporate. By sect. 3 of 33 & 34 Vict. c. 28, it was defined as including a corporation only.

The definition of “Provincial law societies or associations,” as set out in this section, will apparently exclude a great number of country law societies from the operation of the Act, as above two-thirds of those societies are not within either of the qualifications required by the definition.

The Act came into operation on the 22nd August, 1881.

### General Orders.

2. In England the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, and the president for the time being of the Incorporated Law Society, and the president of one of the provincial law societies or associations, to be selected and nominated from time to time by the Lord Chancellor to serve

Power to  
 make Gen-  
 eral Orders  
 for remun-  
 eration in  
 convey-  
 ancing, &c.



Sect. 2. during the tenure of office of such president, or any three of them, the Lord Chancellor being one, and, in Ireland, the Lord Chancellor, the Lord Chief Justice of Ireland, the Master of the Rolls, and the president for the time being of the Incorporated Law Society, or any three of them, the Lord Chancellor being one, may from time to time make any such general order as to them seems fit for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action, or transacted in any court, or in the chambers of any judge or master, and not being otherwise contentious business, and may revoke or alter any such order.

A new scale of remuneration in conveyancing and other non-contentious business has been recently issued by the Council of the Incorporated Law Society, and which will probably be submitted to the Lord Chancellor.

Communi-  
cation to  
Incorpor-  
ated Law  
Society.

3. One month at least before any such general order shall be made, the Lord Chancellor shall cause a copy of the regulations and provisions proposed to be embodied therein to be communicated in writing to the Council of the Incorporated Law Society, who shall be at liberty to submit such observations and suggestions in writing as they may think fit to offer thereon; and the Lord Chancellor, and the other persons hereby authorized to make such order, shall take

into consideration any such observations or suggestions which may be submitted to them by the said council within one month from the day on which such communication to the said council shall have been made as aforesaid, and, after duly considering the same, may make such order, either in the form or to the effect originally communicated to the said council, or with such alterations, additions, or amendments, as to them may seem fit. Sect. 3.

4. Any general order under this Act may as regards the mode of remuneration, prescribe that it shall be according to a scale of rates of commission or per-centage, varying or not in different classes of business, or by a gross sum, or by a fixed sum for each document prepared or perused, without regard to length, or in any other mode, or partly in one mode and partly in another, or others, and may, as regards the amount of the remuneration, regulate the same with reference to all or any of the following, among other, considerations; (namely,)

The position of the party for whom the solicitor is concerned in any business, that is, whether as vendor or as purchaser, lessor or lessee, mortgagor or mortgagee, and the like:

The place, district, and circumstances at or in which the business or part thereof is transacted:

**Sect. 4.** The amount of the capital money or of the rent to which the business relates :

The skill, labour, and responsibility involved therein on the part of the solicitor :

The number and importance of the documents prepared or perused, without regard to length :

The average or ordinary remuneration obtained by solicitors in like business at the passing of this Act.

Security for costs, and interest on disbursements.

**5.** Any general order under this Act may authorize and regulate the taking by a solicitor from his client of security for future remuneration in accordance with any such order, to be ascertained by taxation or otherwise, and the allowance of interest.

With respect to the dealings between solicitors and clients it was held that a solicitor could not take a security from his client, nor apply one taken for future costs (*Re Foster*, 2 D. F. J. 105), nor, previously to the Attorneys and Solicitors Act, 1870, accept a promise from his client of a gift for professional services beyond his legal remuneration. Seton on Decrees, 646 ; *O'Brien v. Lewis*, 11 W. R. 318 ; but see sect. 4 of that Act.

Order to be laid before houses of parliament; disallowance on address.

**6.—(1.)** Any general order under this Act shall not take effect unless and until it has been laid before each house of parliament, and one month thereafter has elapsed.

**(2.)** If within that month an address is presented to the Queen by either house, seeking the

disallowance of the order, or part thereof, it shall be lawful for Her Majesty, by order in council, to disallow the order, or that part, and the order or part disallowed shall not take effect. Sect. 6.

7. As long as any general order under this Act is in operation, the taxation of bills of costs of solicitors shall be regulated thereby. Effect of order as to taxation.

### *Agreements.*

8.—(1.) With respect to any business to which the foregoing provisions of this Act relate, whether any general order under this Act is in operation or not, it shall be competent for a solicitor to make an agreement with his client, and for a client to make an agreement with his solicitor, before or after or in the course of the transaction of any such business, for the remuneration of the solicitor, to such amount and in such manner as the solicitor and the client think fit, either by a gross sum, or by commission or percentage, or by salary, or otherwise; and it shall be competent for the solicitor to accept from the client, and for the client to give to the solicitor, remuneration accordingly. Power for solicitor and client to agree on form and amount of remuneration.

For the judicial construction placed upon the word "agreement," see *Re Lewis*, 1 Q. B. D. 724; *Bewley v. Atkinson*, 13 Ch. D. 283, 299; and *Re Fernandes*, W. N. 1878, p. 57.

As to an agreement between a client and a solicitor that the latter should be paid a fixed salary, clear of all ex-

**Note to S. 8 ss.1.**            penses of his office, see *Galloway v. Corporation of London*, L. R. 4 Eq. 90.

(2.) The agreement shall be in writing, signed by the person to be bound thereby or by his agent in that behalf.

This sub-section provides that the agreement shall be in writing, signed by the person to be bound thereby, whereas, in sect. 4 of the Attorneys and Solicitors Act, 1870, it was necessary that both parties should sign the agreement. *Re Lewis*, 1 Q. B. D. 724. For a definition of the words "in writing," see sect. 2 (xvi.) of the Conveyancing and Law of Property Act, 1881, p. 5, *ante*.

(3.) The agreement may, if the solicitor and the client think fit, be made on the terms that the amount of the remuneration therein stipulated for either shall include or shall not include all or any disbursements made by the solicitor in respect of searches, plans, travelling, stamps, fees, or other matters.

(4.) The agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor; and if, under any order for taxation of costs, such agreement being relied upon by the solicitor shall be objected to by the client as unfair or unreasonable, the taxing master or officer of the court may inquire into the facts, and certify the same to the court; and if, upon such certificate, it shall appear to the court or judge that just

cause has been shown either for cancelling the Sect. 8. agreement, or for reducing the amount payable under the same, the court or judge shall have power to order such cancellation or reduction, and to give all such directions necessary or proper for the purpose of carrying such order into effect, or otherwise consequential thereon, as to the court or judge may seem fit.

9. The Attorneys and Solicitors Act, 1870, shall not apply to any business to which this Act relates.

Restriction on  
Solicitors  
Act, 1870.  
33 & 34  
Vict. c. 28.

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## INDEX .

---

- ABSTRACT OF TITLE,  
    what, purchaser entitled to call for, 5.  
    verification of, purchaser bears expense of, 10.  
    on sale of property in lots, 11.  
    tracing or getting in legal estate, 11.
- ACCOUNT,  
    effect of advance on joint, 118.
- ACCUMULATIONS,  
    ultimate trusts of, during minority, 92, 96.  
    investments authorized by law, 96.
- ACKNOWLEDGMENT,  
    of right to production of documents, 29.  
    binds person who retains them, 30.  
    obligations imposed by, 31.  
        costs of specific performance of, 31.  
    no right to damages for loss, 32.  
    form of, 174.
- ACT,  
    commencement of, 1.
- ACTION,  
    relief against forfeiture of leases, 38.  
    sale of mortgaged property in, 62.  
    power for trustees and executors to compromise, 83.
- ADOPTION OF ACT,  
    protection of solicitors and trustees, 126.
- ADVANCE,  
    effect of, or joint account, &c., 118.
- AFFIDAVIT,  
    verifying power of attorney, form of, 176.
- AGENT,  
    execution of deed by an, 102.



*Index.*

AGREEMENT,

in writing as to leasing powers in mortgage, 49.  
between solicitor and client as to costs, 185.

‘ALL THE ESTATE,’

conveyance shall pass, 120.

ANNEXED DEED,

construction of, 109.

ANNUAL CHARGES ON LAND,

remedy for recovery of, 97.  
redemption of, 100.

ANTICIPATION, RESTRAINT ON. *See* MARRIED WOMAN.

APPLICATION,

under the Act, how made, 39, 88, 89.  
of purchase-moneys under power of sale in mortgage, 54.  
of insurance money, 58.  
of money by receiver, 61.  
person paying to trustee exonerated from seeing to, 82.  
of income for maintenance, 91.

APPOINTMENT,

of receiver by mortgagee, 59.  
of new trustees, 72.  
of attorney by married woman, 86.  
of trustees to manage infant's land, 89.

APPORTIONMENT,

of conditions on severance, &c., 36.

ARBITRATION,

power for executors and trustees to submit to, 83.

ARREARS,

power to recover all, of annual sums charged on land,  
99.

ASSIGNMENT,

of reversion, 34.  
of mortgage debt, 41.

ASSIGNING,

covenant against, excepted from section, 40.

ASSIGNS,

of sub-lease, no right to call for title to reversion, 5.

## *Index.*

### ASSIGNS—*continued.*

covenants to bind heirs and, 113.

absence of word, in covenant by lessee, effect of, 114.

### ATTESTING WITNESS,

rights of purchaser as to execution of purchase deed  
29, 112.

### ATTORNEY, POWERS OF. *See* TABLE OF CONTENTS.

of married woman, 86.

donee of, may execute deed in his own name, 102.

payment by attorney without notice of death, &c., 102.

deposit of instruments creating, in central office, 103.

### AUCTION,

power for trustees to sell by, 79.

to buy in at, 80.

### AUTHORITY,

receipt in deed, for payment to solicitor, 112.

### BANKRUPTCY,

definition of, 5.

forfeiture of lease on, 40.

of donor of power of attorney, 103.

### BARE TRUSTEE,

death of, intestate, 135.

### BENEFICIAL OWNER,

covenants for title implied on conveyance by, 19—27.

mortgage by, 22—27.

### BENEFIT,

of lessee's covenants to run with reversion, 34.

of married woman, 85.

meaning of term "for her benefit," 86.

of infant, 91, 95.

### BOND,

binds heirs and real estate, 115.

with two or more jointly, effect of, 116.

### BREACH OF COVENANT. *See* COVENANT.

### BUILDING LEASE,

definition of, 4.

may be granted by mortgagor or mortgagee, 46.

### BUILDING PURPOSES,

definition of, 4.

*Index.*

- CERTIFICATE,  
of copyhold commissioners, land discharged from rent-charge by, 101.
- CHARGES,  
on land. *See* ANNUAL CHARGES.
- CHATTELS REAL,  
power to assign, under Lord St. Leonard's Act, 105.
- CHIEF RENT,  
redemption of, 100.
- CHOSSES IN ACTION,  
vesting of, in new trustees, 77.  
conveyancing of, by a person to himself, &c., 105.
- CLIENT,  
definition of, 179.
- CODICIL,  
will includes, 4.
- COLLATERAL POWERS. *See* POWERS.
- COMMENCEMENT OF CONVEYANCING ACT, 1.
- COMMENCEMENT OF TITLE, 6—9.
- COMMISSION,  
receiver entitled to, 60.
- COMMON LAW PROCEDURE ACT, 38, 137.
- COMPENSATION,  
for loss of or injury to documents, 33.
- COMPLETION OF CONTRACT,  
after death of vendor, by personal representatives, 12.
- COMPOUND,  
power for executors and trustees to, 83.
- COMPROMISE,  
power of executors and trustees to, 83.
- CONDITION,  
incident to reversion, notwithstanding severance, 34.  
apportionment of, on severance, &c., 36.  
waiver of, of re-entry, 37.
- CONDITIONS OF SALE. *See* TABLE OF CONTENTS.  
application of stated, to all purchases, 5.  
no right to call for title to leasehold reversion, 5.

CONDITIONS OF SALE—*continued.*

- title to enfranchised copyholds, 7.
- production of documents, 7.
- requisitions as to prior title, 8.
- recitals assumed to be correct, 8.
- lease assumed to have been duly granted, 9.
- underlease duly granted, 9.
- receipt for last payment, evidence, 9.
- expenses of production and inspection, 10.
- on sale of property in lots, 11.
- discretion in trustees for sale as to, 80.

CONSIDERATION,

- receipt for, in deed or indorsed, 109—112.

CONSOLIDATION OF MORTGAGES,

- restriction on, 43.

CONSTRUCTION,

- and effect of deeds and other instruments, 105—121.
- of supplemental or annexed deed, 109.
- of implied covenants, 121.

CONTRACT,

- for sale, conditions implied in, 5.
- completion of, after death of vendor, 12.
- on sub-demise, title to leasehold reversion not to be required, 37.
- under seal binds heirs and real estate, 115.
- with two or more jointly, effect of, 116.

CONTRARY INTENTION,

- as to, 48.

CONVEYANCE. *See* TABLE OF CONTENTS.

- definition of, 2.
- by personal representatives of vendor, 12.
- what included in, of land, 15.
- of a manor, 17.
- covenants implied in, 18.
- by way of mortgage, 22.
- by way of settlement, 25.
- by trustee or mortgagee, 26.
- rights of purchaser as to execution of, 29.
- by mortgagee exercising power of sale, 53.
- execution of, under power of attorney, 102.
- use of word "grant" unnecessary in, 105.
- by a person to himself or to wife, 105.
- wife to husband, 105.
- words of limitation in, 106.

## *Index.*

### CONVEYANCE—*continued.*

- of easements, &c., by way of use, 119.
- shall pass "all the estate," &c., 120.
- forms of, 143.

### COPIES,

- conditions as to, 10.
- right to, under acknowledgment, 31.
- power for mortgagor to make, 42.
- as to, of instruments deposited in central office, 104.

### COPYHOLD COMMISSIONERS,

- power to certify that rent is redeemed, 100.

### COPYHOLDS. *See* TABLE OF CONTENTS.

- converted into freeholds by enfranchisement, 7.
- completion of contract for sale of, after vendor's death, 13.
- covenants for title as to, 27.
- as to conveyance by mortgagee exercising power of sale, 53.
- excepted from operation of section, 79.

### COSTS,

- of acknowledgment of right to production of documents, 31.
- discretion of court as to, in granting relief against forfeitures, 39.
- incident to sale, by mortgagee, 55.
- incurred by receiver, to be retained out of money received, 60.
- security for, in sale of mortgaged property, 63.
- of appointment of new trustees, 73.
- the court has an absolute discretion as to, 131.
- as to solicitors' costs. *See* SOLICITORS' REMUNERATION Act, 179—187.
- power to make general orders as to, in non-contentious business, 181.
- security for future, and interest on disbursements, 184.
- effect of order as to taxation of, 185.
- agreements between solicitor and client as to, 185.

### COUNTERPART OF LEASE,

- mortgagor to deliver to mortgagee a, 47.

### COUNTY COURTS,

- no power to entertain an application, 39, 86.
- have no jurisdiction in matters under Conveyancing Act, 130.

## *Index.*

### COURT,

- definition of, 5, 14.
- provision by, for incumbrances, and sale freed therefrom, 13.
- application to the, how made, 39, 88, 89.
- powers of new trustees appointed by, 77.
- may appoint trustees to manage infant's land, 89.
- regulations respecting payments into, and applications, 130.
- orders of, conclusive, 132.
- interpretation of, with respect to Ireland, 134.

### COVENANTS,

- for title, 18—28. *See* COVENANTS FOR TITLE.
- as to production of documents, 32.
- lessee's run with reversion, 34.
- benefit of lessee's, to run with reversion, 34.
- obligation of lessor's to run with reversion, 35.
- lessor's run with reversion, 35.
- breach of, restrictions on re-entry or forfeiture for, 38.
- as excepted from section 14, 40.
- implied in statutory mortgage, 65.
- implied in transfer of mortgage, 67.
  - in cases of several mortgagors and mortgagees, 69.
- to bind heirs, &c., 113.
- to extend to heirs, &c., 115.
- effect of, with two or more jointly, 117.
- construction of implied, 121.

### COVENANTS FOR TITLE,

- implied in conveyance for value, by beneficial owner, 19.
  - of leaseholds for value, 21.
  - on mortgage, 22.
    - of leaseholds, 24.
  - on settlement, 25.
  - by trustee or mortgagee, 26.
- where a person conveys by direction of another, 26.
- by husband and wife, 27.
- as to copyholds, 27.
- run with the land, 28.

### CUSTODY,

- undertaking for safe, of documents, 29.
- place provided by Conveyancing Act for safe, of original instruments, 104.

## *Index.*

CUSTOMARY FREEHOLDS. *See* COPYHOLDS.

### DAMAGES,

- for loss or destruction of documents, 33.
- for irregular exercise of power of sale, 54.

### DEATH,

- completion of contract after vendor's, 12.
- devolution of trust and mortgage estates on, 71.
- of trustee before testator, 75.
- of infant under 21, trusts of accumulations, 92.
- payment by attorney under power without notice of, 103.

### DEBT,

- power for executors and trustees to compound, &c., 82.

### DEEDS. *See* TABLE OF CONTENTS.

- execution of purchase, right of purchaser as to, 29.
- production and safe custody of title, 29.
- right to damages for loss of, 32.
- power for mortgagor to inspect title, 42.
- restriction on production of title, 43.
- person entitled to exercise power of sale may recover, 56.
- vesting trust property in new trustees, 77.
- execution of, by an agent, 102.
- construction and effect of, 105—121.
  - of supplemental or annexed, 109.
- receipt in, sufficient, 109.
  - evidence of payment, 111.
  - authority for payment to solicitor, 112.

### DEFINITION OF WORDS IN CONVEYANCING ACT, 2.

### DEMISE FOR A TERM OF YEARS,

- person entitled to annual charge may, 99.

### DEPOSIT,

- of sum to cover expenses of abortive sale, 65.
- of original instruments creating powers of attorney, 103.

### DESTRUCTION OF DOCUMENTS.

- no right to damages for, conferred by acknowledgment, 32.
- right to damages conferred by undertaking, 33.

### DEVOLUTION,

- of trust and mortgage estates on death, 71.

## *Index.*

### DISCHARGE,

- of incumbrances on sale, 13.
- receipt of mortgagee sufficient, for money under power of sale, 56.
  - trustee sufficient, for trust money, 82.
  - married woman sufficient, for accumulations, 92.
- in deed sufficient, 110.
- of survivor of joint mortgagees a complete, 118.

### DISCRETION,

- of court as to relief against forfeiture of leases, 39.
  - as to sale of mortgaged property, 62.
  - as to binding interest of married woman, 85.
  - as to order for costs, 131.

### DISTRESS,

- for recovery of annual sums charged on lands, 97.

### DOCUMENTS,

- production of, 7.
- purchaser to bear expense of inspection, 10.
- acknowledgment of right to production, 29.
- inspection of, how enforced, 31.
- undertaking for safe custody of, 32.
- may be deposited in central office, 104.

### EASEMENTS,

- when implied in conveyance, 16.
- grants of, by way of use, 119.

### EDUCATION OF INFANT. *See* MAINTENANCE.

### ENFRANCHISEMENT,

- purchaser cannot call for title to make, 7.

### ENLARGEMENT of residue of term, 121. *See* LONG TERMS.

### ENTRY,

- as to powers of trustees during minority by, 89.
- remedy for recovery of annual sums by, 97.

### EQUITABLE MORTGAGE. *See* MORTGAGE.

### EQUITY OF REDEMPTION. *See* MORTGAGE.

### ESTATE,

- right, title, &c., provision for all the, 120.



## *Index.*

ESTATE TAIL,  
what words of limitation in deed sufficient to create,  
107.

EVIDENCE,  
office copy of deposited instrument to be sufficient,  
104.  
receipt in deed or indorsed, for subsequent purchaser,  
111.

EXECUTION,  
of purchase deed, rights of purchaser as to, 29.  
as to, of power of attorney, 87.  
under power of attorney, 102.

EXECUTORS.  
may pay debts on evidence they think sufficient, 82.  
power for, to compound, &c., 83.  
powers of, may be exercised by survivor, 85.  
covenants binding on, 114.  
protected in adopting Act, 127.

EXPENSES,  
as to documents, &c., not in vendor's possession, 10.  
of mortgagor's inspection of title deeds, 42.  
of sale of mortgagee, 55.  
incurred by receiver, 60.  
in management of infant's land, 91.

EXTENT OF ACT,  
does not extended to Scotland, 2.  
with modifications is applicable to Ireland, 2.

FEE SIMPLE,  
what words of limitation in deed sufficient, 106.  
enlargement of residue of long term into, 122.

FINE,  
definition of, 4.

FORECLOSURE. *See* MORTGAGE.

FORFEITURE OF LEASE. *See* LEASE.

FORMS. *See* TABLE OF CONTENTS.  
of statutory mortgage, 65.  
transfer of mortgage, 66.  
re-conveyance, 70.

## *Index.*

### FORMS—*continued.*

- sufficiency of statutory, 113.
- further charge, 142.
- conveyance on sale, 143.
- marriage settlement, 144.

### FREEHOLDS,

- vesting of trust property in new trustees, 77.
- conveyance of, by a person to himself, &c., 105.

### FURTHER CHARGE. *See* TABLE OF CONTENTS.

### GENERAL ORDERS,

- under Solicitors Remuneration Act, 181.

### GENERAL WORDS,

- implied in conveyance of land, 15.
  - of buildings, 16.
  - of manor, 16.
- intention to exclude, 16.
- mines and minerals omitted in statutory forms of, 16.

### GOVERNMENT SECURITIES,

- definition of, 14.

### GRANT,

- use of word, unnecessary, 105.
- of easements, &c., by way of use, 119.

### GUARDIAN,

- management of land, &c., during minority by, 89.
- payments to, for infant's maintenance, 94.

### HEIRS,

- limitation of estate in fee simple without the word,  
107.
- covenants to extend to, 115.

### HEIRS AND ASSIGNS,

- personal representatives deemed, 71.
- covenants to bind, 113.

### “HIMSELF,”

- what is included in the word, 106.

### HUSBAND,

- covenants for title implied in conveyance by, 27.
- conveyance by, to wife, 105.

## *Index.*

IMPLIED CONDITIONS OF SALE, 5.

IMPLIED COVENANTS. *See* COVENANTS.

INCOME,

definition of, 2.

power for mortgagee to appoint receiver of, 50.

application by trustees of infant's, 91.

INCORPORATED LAW SOCIETY,

interpretation of term, 180.

INCUMBRANCER,

definition of, 3.

notice to, 15.

INCUMBRANCES,

definition of, 3.

discharge of, on sale, 13.

implied covenant against, 26.

sale subject to, by trustees, 80.

INDEMNITY,

to person acting in pursuance of power of attorney,  
103.

INDORSED RECEIPT. *See* RECEIPT.

INDORSEMENT,

supplemental or annexed deed read as if made by way  
of, 109.

INFANT,

trustees may apply income, &c., for maintenance of,  
91.

female, on marriage entitled to accumulations, 92.

married woman, power of, to appoint an attorney, 86.

land of, in certain cases, shall be deemed a settled  
estate, 87.

owner, sale and leases on behalf of, 87.

management of infant's land by trustees, 89.

may exercise powers over personalty, 108.

INHERITANCE,

covenants relating to land of, 113.

INQUIRY,

purchaser relieved from making, 56.

INSPECTION OF DOCUMENTS. *See* DOCUMENTS.

## *Index.*

### INSTRUMENT.

definition of, 5.

### INSURANCE,

mortgagee's powers as to, 52.

amount and application of, money, 57.

trustee's of infant's land may effect, 90.

### INSURE.

breach of covenant to, relief against forfeiture, 38.

### INTERPRETATION OF WORDS IN CONVEY- ANCING ACT, 2.

### INVESTMENTS,

authorized by law, 92, 96.

### IRELAND,

modifications in Conveyancing Act respecting, 134.

### JOINT ACCOUNT,

effect of advance on, 118.

### JOINT AND SEVERAL,

implied covenants, in statutory mortgage, 69.

### "JOINTLY,"

construction of word, 106.

### JOURNEYS,

expenses of, to be borne by purchaser, 10.

### JUDICATURE ACT. *See* STATUTES.

### JURISDICTION,

orders of court not to be invalidated for want of, 132.

### LANCASTER, COUNTY PALATINE OF,

rules for regulating proceedings in, 131.

### LAND,

definition of, 2.

sale of, freed from incumbrances, 14.

general words in conveyances of, 16.

remedies for recovery of annual sums charged on, 97.

covenants relating to, of inheritance, 113.

### LAND TRANSFER ACT. *See* STATUTES, 38 & 39 Vict. c. 87.

## *Index.*

### LEASE,

- assumptions to be made by purchaser of, 9.
- implied covenant as to validity of, 24.
- rent and benefit of lessee's covenants to run with reversion, 34.
- obligation of lessor's covenants to run with reversion, 35.
- apportionment of conditions on severance, &c., 36.
- relief against forfeiture of, 38.
- by mortgagor or mortgagee in possession, 45.
- counterpart of, delivery of, 47.
- of infant's land, 87.

### LEASEHOLD,

- title to, reversion cannot be called for, 5.
- implied conditions of sale in purchase of, 9.
- implied covenants for title on conveyance of, 21
- on sub-demise, title to, reversion not to be required, 37.

### LESSEE,

- as to service of notice on, 128.

### LESSOR. *See* LEASE.

### LIEN,

- incumbrance includes a, 3.
- absence of indorsed receipt no notice of vendor's, 111.

### LIMITATION,

- words of, in fee or in tail, 106.

### LONG TERM. *See* TABLE OF CONTENTS.

- enlargement of residue of, into fee simple, 121.

### LOSS OF DEEDS. *See* DEEDS.

### LOTS,

- standard conditions as to sale of property in, 11.
- power for trustees for sale to sell property in, 80.

### LUNACY,

- payment by attorney under power without notice of, 103.

### MAINTENANCE,

- trustees may apply income for infant's, 91, 95.

### MANAGEMENT,

- powers of. *See* TRUSTEES.

## *Index.*

- MANAGER,  
distinction between receiver and, 59.
- MANOR,  
definition of, 2.  
several words included in conveyance of, 17.
- MARRIED WOMAN,  
implied covenants for title by, 27.  
power for Court to bind interest of, 85.  
may appoint an attorney, although an infant, 86.  
may release or extinguish a power, 108.
- METROPOLITAN BUILDING ACT,  
provisions of, as to insurance money, 58.
- MINES AND MINERALS,  
omitted in general words, 16.  
as to opening and working of, 52.  
trustees of infant's land may continue the working of, 90.  
fee simple in, acquired by enlargement of long term, 125.
- MINING LEASE,  
defined, 4.  
forfeiture of, on breach of covenant for inspection, 40.
- MONTH,  
meaning of, 53.
- MORTGAGE. *See* TABLE OF CONTENTS.  
definition of, 3.  
implied covenants for title in, 22, 24.  
assignment of, debt, 42.  
restriction on consolidation, 43.  
statutory powers implied in, 49.  
action respecting, 62.  
form of statutory, 65.  
forms of statutory transfer of, 66.  
form of reconveyance of statutory, 70.  
devolution of trust and, estates on death, 70.  
not vested in new trustees by declaration, 77.  
effect of advance on joint account, &c., 118.
- MORTGAGEE,  
definition of, 3.  
obligation on, to transfer instead of reconveying, 41.  
to allow inspection of deeds, 42.

## *Index.*

### MORTGAGEE—*continued.*

- powers incident to estate or interest of, 49.
- regulation of exercise of power of sale, 52.
- receipts of, discharges for purchase-money, 56.
- amount and application of insurance money, 57.
- entitled to appoint a receiver, 59.
- questions arising in case of a sale by, 136.

### MORTGAGEE IN POSSESSION,

- definition of, 3.
- sect. 15, not applicable to a, 42.
- leasing powers of, 45.
- power of, to cut and sell timber, 50.

### MORTGAGOR,

- definition of, 3.
- implied covenants for title by, 22, 24.
- power for, to inspect title deeds, 42.
- leasing powers of, 45.
- should be a party to transfer of mortgage debt, 69.
- as to service of notice on, 128.

### NEW TRUSTEES. *See* TRUSTEES.

### NOTICE,

- constructive, of lessor's title, 7.
- to incumbrancers, 15.
- by lessor to lessee of breach of covenant, 38.
- by mortgagee requiring payment of mortgage debt, 52.
- as to redemption of quit-rents, &c., 100.
- absence of indorsed receipt no, of vendor's lien, 111.
- regulations respecting, 128.

### OBJECTIONS,

- as to prior title restricted, 8.

### OBLIGATIONS UNDER SEAL. *See* BOND.

### OFFICE COPY,

- of instrument deposited to be evidence, 104.

### ORDERS OF COURT,

- to be conclusive, 132.

### ORDERS, GENERAL. *See* GENERAL ORDERS.

### PALATINE COURT. *See* LANCASTER.

## *Index.*

- PARENT,  
income for infant's maintenance may be paid to, 94.
- PARTIES,  
to action for foreclosure and sale, 62.
- PARTY,  
mortgagor should be made a, 69.
- PAYMENT,  
into court of a sum to meet prior incumbrance, 54.  
by attorney under power without notice of death,  
&c., 102.  
necessity for, to some one properly authorized, 110.  
of purchase money to vendor's solicitor, 112.  
regulations respecting, into court, 130.
- PERSON,  
definition of, 180.
- PERSONAL REPRESENTATIVES,  
have statutory power to convey, 12.  
trust and mortgage estates vest in, 71.
- PLACE OF ABODE,  
service of notice at, 128.
- POSSESSION,  
includes receipt of income, 2.
- POSSESSION OR CONTROL, 30.
- POST,  
service of notice by, 129.
- POWERS,  
documents creating, when to be produced, 7, 8.  
leasing, of mortgagor and of mortgagee in possession, 45.  
incident to estate or interest of mortgagee, 49.  
of new trustees appointed by court, 77.  
for trustees for sale to sell by auction, &c., 79.  
for executors and trustees to compound, &c., 82.  
may be exercised by survivors, 84.  
of court to bind interest of married woman, 85.  
of attorney, of married woman, 86.  
execution under, 102.  
payment in pursuance of, protected, 102.  
simply collateral, 107.  
different kinds of, 108.



## *Index.*

### POWERS—*continued.*

in gross, 108.

doctrine of fraud on, not affected, 109.

persons entitled to exercise, of enlarging term into a fee, 124.

### PREMIUM,

included in fine, 4.

paid by mortgagee for insurance a charge on property, 50.

### PRIVATE CONTRACT,

power for trustees to sell by, 80.

### PRIVILEGES,

conveyance of land includes easements and, 16.

### PRODUCTION,

of documents. *See* DOCUMENTS.

### PROPERTY,

definition of, 2, 81.

### PROVINCIAL LAW SOCIETY,

definition of, 180.

### PROVISO,

for redemption implied in statutory mortgage, 66.

### PURCHASE-MONEY,

whether purchaser is required to see to application of, 82.

payment of, to vendor's solicitor, 112.

### PURCHASER,

definition of, 4, 111, 131.

right of, to make requisitions, &c., restricted, 7.

rights of, as to execution of conveyance, 29.

receipt in deed evidence for subsequent, 111.

application to Court by, 131.

### QUIT RENT,

redemption of, 100.

### REASONABLE TIME, 38.

### RECEIPT,

for rent, evidence to purchaser, 9.

mortgagee's, in writing, 56.

## *Index.*

### RECEIPT—*continued.*

- power for mortgagee to give, for purchase-money, 56.
- by anticipation, 82.
- in deed sufficient, 110,
  - evidence for subsequent purchaser, 111.
  - authority for payment to solicitor, 112.

### RECEIVER,

- power of mortgagee to appoint, 50.
- appointment, powers, remuneration, &c., of, 59.
- distinction between manager and, 59.

### RECITALS,

- in deeds twenty years' old to be evidence, 8, 69.
- in abstracted documents when assumed to be correct, 8.

### RECONVEYANCE. *See* TABLE OF CONTENTS.

- transfer instead of, obligation on mortgagee, 41.
- statutory form of, 70.

### REDEMPTION,

- action for, sales in, 62.
- time for, 65.
- proviso for, in statutory mortgage, 66.
- of quit-rents and other perpetual charges, 100.

### RE-ENTRY,

- apportionment of right of, on severance, &c., 36.
- right of, for breach of covenant restricted, 39.
- condition of, in lease by mortgagor or mortgagee in possession, 46.

### REGISTRATION,

- of deed vesting trust property in new trustees, 77.

### RELIEF AGAINST FORFEITURE. *See* LEASE.

### REMUNERATION,

- of receiver, 59.
- of solicitors in respect of conveyancing, &c., business, 179—187.
- power for solicitor and client to agree on amount of, 185.

### RENT,

- definition of, 4.
- receipt for, evidence to purchaser, 9.
- runs with reversion, 34.
- application of surplus, 60.

## *Index.*

### RENT—*continued.*

ultimate trust of accumulated, during minority, 93.  
enlargement of long term subject to nominal, 122.

### RENT-CHARGE,

redemption of, 100.

### REPEAL OF ENACTMENTS,

8 & 9 Vict. c. 119 (Lord Brougham's Act), 133, 138.  
15 & 16 Vict. c. 86, s. 48 (Chancery Procedure Act),  
63, 138.  
22 & 23 Vict. c. 35, ss. 4—9 (Lord St. Leonard's Act)  
41, 137.  
23 & 24 Vict. c. 126, s. 2 (Common Law Procedure),  
41, 137.  
23 & 24 Vict. c. 145, ss. 11—30 (Lord Cranworth's  
Act), 133, 138.  
37 & 38 Vict. c. 78, s. 4 (Vendor and Purchaser), 71.  
ss. 5, 7.....135.  
38 & 39 Vict. c. 87, s. 48 (Land Transfer), 71

### REQUISITIONS,

restrictions on, by implied conditions of sale, 5—11.

### RÉSIDENCE ABROAD,

appointment of new trustee, 73.

### RESTRAINT ON ANTICIPATION,

court may bind interest of married woman notwithstanding, 85.

### RETIREMENT OF TRUSTEE. *See* TRUSTEE.

### RETROSPECTIVE,

what sections in Conveyancing Act are, 2.

### REVERSION,

title to, not to be called for, 5, 7, 37.  
rent and benefit of lessee's covenants run with, 34.  
obligation of lessor's covenants run with, 35.  
apportionment of conditions on severance, &c. of, 36.

### RIGHTS, LIBERTIES, AND PRIVILEGES,

grant of, by way of use, 119.

### RULES,

power to make, for purposes of Conveyancing Act, 131.  
as to Ireland, 135.

### SAFE CUSTODY OF DOCUMENTS. *See* DOCUMENTS.

18

## *Index.*

### SALE,

- definition of, 4, 11.
- conditions of, application of stated, to all purchases, 5.
- condition as to, of property in lots, 11.
- completion of contract for, after vendor's death, 12.
- discharge of incumbrances on, 14.
- execution of deed on, rights of purchaser as to, 29.
- surplus proceeds of, 55.
- by trustees under a trust or power, 79.
- of infant's land under the Settled Estates Act, 87.

### SALE, POWER OF,

- incident to estate of mortgagee, 51.
- regulation of exercise of, 52
- conveyance under, 53.
- mortgagee can give receipt for money arising under 56.

### SCHEDULE,

- of Acts affected, 136,
- of Acts repealed, 137.
- of statutory forms, 138.
- of short forms of deeds, 141.

### SCOTLAND,

- Act does not apply to, 2.

### SEARCHES,

- implied condition of sale as to expenses of, 10.
- of file of deposited instruments in central office, 104.

### SECURITIES,

- definition of, 5, 14.
- receipt for, by trustees, 81.
- to be a sufficient discharge, 110.

### SECURITY FOR COSTS. *See* Costs.

### SEPARATE PROPERTY,

- restraint on anticipation may be dispensed with by the Court, 85.

### SERVICE,

- of notice on lessee by lessor, regulations as to, 38.
- by post to place of abode, 129.

### SETTLED ESTATES ACT,

- tendency to abolish "restraint on anticipation," 86.
- extension of, to infant's land, 87.

## *Index.*

### SETTLED ESTATES ACT—*continued.*

orders under, not invalidated as against purchaser,  
133.

### SETTLEMENT. *See* TABLE OF CONTENTS.

implied covenant in, 25.

form of marriage, 144.

### SEVERANCE. *See* REVERSION.

### SHARES,

not vested in new trustees by declaration, 79.

### SOLICITOR,

receipt in deed authority for payment to, 112.

protection of, adopting act, 126.

persons in fiduciary position acting without a, pro-  
tected, 127.

definition of, 179.

remuneration of, 180, 183.

agreements between clients, and, 185.

### SOLICITORS REMUNERATION ACT, 179—187.

### SPECIALTY,

difference between, where heir is named and where not  
named, 115.

### STAMP,

on acknowledgment, 30.

on statutory transfer of mortgage, 69.

on conveyance on appointment of new trustee, 78.

on deed converting long term into a fee simple, 126.

### STATUTES,

32 Hen. 8, c. 34 (Condition of Re-entry), 34.

14 Geo. 3, c. 78, s. 83 (Insurance), 58.

11 Geo. 4 & 1 Will. 4, c. 47 (Fraudulent Devises),  
115.

3 & 4 Will. 4, c. 74, s. 77 (Fines and Recoveries),  
108.

3 & 4 Will. 4, c. 104 (Simple Contract Debts), 115.

5 & 6 Will. 4, c. 62 (Statutory Declarations), 129.

1 & 2 Vict. c. 110 (Judgments), 136.

2 & 3 Vict. c. 11 (Judgments), 136.

6 & 7 Vict. c. 73 (Solicitors), 181.

8 & 9 Vict. c. 99, s. 5 (Crown Lands), 37.

c. 106, s. 9 (Amendment of Law of Real  
Property), 123.

c. 119 (Lord Brougham's Act), 138.

## *Index.*

### STATUTES—*continued.*

- 13 & 14 Vict. c. 21, s. 4 (Interpretation of Statutes),  
53, 121.
- 15 & 16 Vict. c. 51 (Copyholds), 7, 100.
  - c. 76, ss. 210, 211 (Common Law Procedure), 38.
  - c. 86, s. 22 (Chancery Procedure Act),  
87.
    - s. 48.....63, 138.
- 18 & 19 Vict. c. 15 (Judgments), 136.
  - c. 43 (Infant's Settlement), 92.
- 20 & 21 Vict. c. 57 (Married Woman), 108.
- 21 & 22 Vict. c. 94 (Copyholds), 100.
- 22 & 23 Vict. c. 35 (Lord St. Leonard's Act) 37, 136.
  - s. 3.....35.
  - ss. 4—9.....38, 137.
  - s. 16.....13.
  - s. 21.....105.
  - s. 26.....103.
- 23 & 24 Vict. c. 38, s. 6 (Property Amendment), 37, 136.
  - c. 115 (Crown Debts), 136.
  - c. 126, s. 1 (Common Law Procedure)  
38.
    - s. 2.....137.
  - c. 127 (Solicitors), 181.
  - c. 145, ss. 1, 2 (Lord Cranworth's Act),  
80, 81.
    - ss. 11—30.....59, 73, 138.
    - s. 15.....54.
    - s. 26.....91, 95, 96.
    - s. 27.....77.
    - s. 29.....82.
    - s. 30.....83, 84.
    - s. 32.....81.
    - s. 34.....84.
- 27 & 28 Vict. c. 112 (Judgments), 137.
- 28 & 29 Vict. c. 104 (Crown Suits), 137.
- 31 & 32 Vict. c. 54 (Judgments), 137.
- 32 & 33 Vict. c. 46 (Specialty Debts), 115.
  - c. 62, s. 4 (Debtors Act), 30.
- 33 & 34 Vict. c. 28, s. 3 (Solicitors), 181.
  - s. 4.....186.
  - c. 97, s. 78 (Stamps), 78.
  - Schedule, 126.
- 34 & 35 Vict. c. 43 (Ecclesiastical Dilapidations), 58.
- 35 & 36 Vict. c. 44, s. 3 (Court of Chancery (Funds)  
Act), 14.

## *Index.*

### STATUTES—*continued.*

- 36 & 37 Vict. c. 66, s. 25 (Judicature Act, 1873), 130.
  - s. 25, sub-s. 8.....59.
  - s. 39.....130.
  - s. 87.....181.
- 37 & 38 Vict. c. 68 (Solicitors), 181.
  - c. 78, s. 1 (Vendor and Purchaser), 8.
    - s. 2.....6, 7, 11, 69.
    - s. 2, sub-s. 1.....37.
    - s. 4.....71.
    - s. 5.....72, 135.
    - s. 7.....135.
- 38 & 39 Vict. c. 77, s. 14 (Judicature Act, 1875), 181.
  - c. 87, s. 48 (Land Transfer), 71, 135.
- 39 & 40 Vict. c. 59, s. 17 (Appellate Jurisdiction), 131.
  - c. 66 (Legal Practitioners), 181.
- 40 & 41 Vict. c. 18, s. 4 (Settled Estates), 87.
  - ss. 10, 12, 13, 16—23, 34.....88.
  - s. 40.....133, 134.
  - s. 41.....130.
  - s. 50.....86.
  - c. 25, ss. 15—21 (Solicitors), 181.
  - c. 57, s. 69 (Judicature Act, Ireland, 1877), 135.
- 41 & 42 Vict. c. 31, s. 8 (Bills of Sale), 45.

### STATUTORY CONDITIONS OF SALE. *See* CONDITIONS OF SALE.

### STATUTORY DECLARATIONS ACT, 1835. SHORT TITLE, 129.

### STATUTORY FORMS, - of mortgage, 65. - of transfer of mortgage, 66. - of reconveyance, 70. - sufficiency of, 113.

### SUB-DEMISE, - on, title to leasehold reversion not to be requir

### SUMMONS IN CHAMBERS, - applications under the Act to be by, 130.

### SUPPLEMENTAL DEED, - construction of, 109.

### SURPLUS PROCEEDS OF SALE, 55.

*Index.*

SURPLUS RENTS,  
application of, 60.

SURRENDER,  
power to trustees to accept, of lease, 90.

SURVIVOR,  
power or trust may be exercised by, 85.  
benefit of covenants, &c., extend to, 117.  
receipt of, 118.

TAIL,  
words of limitation in fee or in, 106.

TAXATION OF COSTS,  
under Solicitors Remuneration Act, 1881.....185.

TERM OF YEARS,  
enlargement into fee simple, 121.

THIRD PARTIES,  
production of title deeds to, 43.

TIMBER,  
power for mortgagee in possession to cut and sell, 50.  
what is, 52.  
ornamental, as to the meaning of, 52.  
trustees restricted in cutting, where infant impeachable  
for waste, 90.

TITHE RENTCHARGE,  
redemption of perpetual charges not to apply to, 100.

TITLE,  
commencement of, 5—9.  
conditions of sale as to, 5.  
to leasehold reversion not to be required, 5, 7, 37.  
forty years substituted for sixty, 6.  
constructive notice of lessor's, 7.  
to enfranchised lands, 7.  
vendor disclosing a prior defective, 9.  
expenses of verifying thrown on the purchaser, 10.

TITLE DEEDS. *See* DEEDS.

TRANSFER OF MORTGAGE. *See* MORTGAGE ; MORT-  
GAGEE ; AND TABLE OF CONTENTS.



## *Index.*

### TRUST AND MORTGAGE ESTATES,

devolution of, on death, 70.

### TRUSTEES. *See* TABLE OF CONTENTS.

implied covenants for title by, 27.

appointment of new, 73.

retirement of, 75.

powers of new, appointed by court, 77.

vesting of trust property in new or continuing, by declaration, 77.

for sale, power of, to sell by auction, &c., 79.

receipts of, to be a sufficient discharge, 81.

power for, to compound, &c., 83.

powers or trusts may be exercised or performed by survivor or survivors of, 84.

not bound to accept terms of compromise, 84.

conduct of, injurious to trust estate, 84.

expenses of management, 91.

application by, of infant's income for maintenance &c., 94.

protection of, adopting Act, 126.

### UNDERLEASE,

on sale of, no right to call for title to reversion, 5.

on sub-demise, title to reversion not to be required, 37.

### UNDERLET,

covenant not to, excepted from section, 40.

### UNDERTAKING. *See* DEEDS ; DOCUMENTS.

### VENDOR AND PURCHASER ACT, 1874. *See* REPEAL OF ENACTMENTS.

### VERIFICATION OF ABSTRACT,

expenses of, to be borne by purchaser, 10.

### VESTING TRUST PROPERTY,

on appointment of new trustees, 72.

on retirement of trustee, 75.

new trustee may exercise powers previous to, 77.

in new or continuing trustees by declaration, 77.

### WAIVER.

of condition, 37.

## *Index*

- WASTE,  
    where infant is impeachable for, trustees not to com-  
    mit, 90.
- WIFE,  
    conveyance by, to husband alone or jointly with  
    another, 105. *See* MARRIED WOMAN.
- WILL,  
    includes codicil, 4.
- WORDS OF LIMITATION,  
    in fee or in tail, 107.
- WRITING,  
    includes print, 5.





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